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NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1994

STATE OF MICHIGAN,

PETITIONER

vs.

RODNEY BELLEW

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE MICHIGAN SUPREME COURT MISCONSTRUE PRECEDENT FROM THIS COURT IN HOLDING THAT A FINDING OF MANIFEST NECESSITY IS REQUIRED DESPITE DEFENSE CONSENT TO A MISTRIAL WHERE THE DEFENSE MOTIVATION FOR CONSENTING TO THE MISTRIAL IS ACTION BY THE TRIAL COURT, HERE THE TRIAL JUDGE'S DISQUALIFICATION OF HERSELF AFTER JEOPARDY HAD ATTACHED AT A BENCH TRIAL, TO WHICH THE DEFENSE DID NOT CONSENT?

II.

DID THE MICHIGAN SUPREME COURT MISCONSTRUE PRECEDENT FROM THIS COURT IN HOLDING THAT A MANIFEST NECESSITY FOR A MISTRIAL CAN ONLY BE FOUND IF A MISTRIAL IS THE "LEAST DRASTIC AVAILABLE REMEDY" AFTER EXPLORATION AND

REJECTION OF ALL AVAILABLE ALTERNATIVES, PARTICULARLY WHERE THE MISTRIAL WAS OCCASIONED BY THE RECUSAL OF THE TRIAL JUDGE AT A BENCH TRIAL AFTER JEOPARDY HAD ATTACHED AND WITNESSES HAD TESTIFIED?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1994

STATE OF MICHIGAN,
PETITIONER
vs.
RODNEY BELLEW
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

NOW COME the State of Michigan, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, TIMOTHY A. BAUGHMAN, Chief of Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above cause on December 30, 1994 by leave granted to review the Michigan Court of Appeals judgment entered on January 7, 1994.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is appended as Appendix A. The Michigan Supreme Court Order granting Leave to Appeal is appended as Appendix B. The opinion of the Michigan Court of Appeals is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on January 7, 1994. The Order of the Michigan Supreme Court granting Petitioner's Leave to Appeal was granted on April 20, 1994. The Michigan Supreme Court judgment was entered in the above cause on December 30, 1994. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides, in pertinent part:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Defendant Rodney Bellew was initially charged with four counts of Receiving and Concealing Stolen Property over the Value of

$100 (MCL 750.535; MSA 28.803), and four counts of Altering a Vehicle Identification Number (VIN) with Intent to Mislead as to Identity (MCL 750.415(1); MSA 28.647) and Owning and Operating a Chop Shop (MCL 750.535a(2); MSA 28.803 (1). Prior to trial, the prosecutor dismissed three of the four Receiving and Concealing Stolen Property counts, and the Chop Shop count due to the inability to produce material witnesses. The defendant was tried and convicted in a waiver trial on the remaining counts, before the Hon. Daphne Means Curtis, in the Recorder's Court for the City of Detroit.

Prior to sentencing, the defendant retained a different attorney, and his new counsel filed a Motion for New Trial based on a claim of ineffective assistance of counsel. The trial court ultimately granted the defendant's motion for a new trial, finding prior counsel to have been

ineffective and a new trial commenced with defendant's new counsel representing him.

After commencement of the new trial on June 9, 1992, the case was unable to be completed due to the court's heavy docket. Upon agreement of the parties, the trial was bifurcated and adjourned to June 23, 1992.

Midtrial, on June 16, 1992, the prosecutor learned of a business arrangement between defense counsel Walter Pookrum and Paul Daniel Curtis, the judge's husband. The extent of the arrangement was unknown, however through business cards, and telephone calls, it became evident that the two shared a common office, common fax number, and a receptionist. (MTN 3,4) A Motion to Disqualify was filed by the prosecutor and heard on June 23, 1992. It was the prosecutor's argument that the trial judge should have disclosed the relationship prior to trial.

Further, the prosecutor argued that the People had a right to know of the relationship prior to trial, cited ethics opinions in support, and noted that the financial arrangements were not public information. Had the People known of a relationship, the People would not have agreed to a waiver trial in front of that judge as the factfinder. Mr. Pookrum denied the existence of a business relationship and argued that jeopardy had attached as the case was midtrial. The prosecutor asked the court to:

> "disqualify herself, send it to an alternate, whoever that might be, we will go from there. Perhaps be able to proceed with this trial that we are in the middle of..."

Judge Curtis indicated that she was not granting a mistrial where she noted that it was imperative:

> "to insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured, I shall

> recuse myself. This matter will be reassigned. This matter will be transferred to Judge Roberson as the Chief Judge of this court to assign as he deems appropriate." (MTN-13.)

Further, the judge clarified that she was not granting a mistrial, and was only:

> "referring it to Judge Roberson for assignment. He will do whatever, hear any motions, or send it to the appropriate judge for hearing of motions. I am simply granting the motion filed by the People." (MTN-13.)

Judge Roberson, the Chief Judge, heard this continuing case on June 23, 1992, where the trial judge's recusal and failure to grant a mistrial was addressed. (HRG on MTN, 5). Initially, Judge Roberson stated that it was a matter for the Michigan Court of Appeals to decide. (HRG-5). Judge Roberson opined that once the jury or witnesses are sworn, that jeopardy had attached and that the prosecutor was asking two triers of fact hear the case. (HRG-5, 7-8). The Chief

Judge indicated that it was not permissible for two triers of fact to hear the case, switching midtrial, and that declaration of a mistrial was necessary. Defense counsel concurred each time. The prosecutor indicated that alternatives were available (i.e. the transcripts were available for review.) (HRG-5.) and advocated substituting factfinders using alternatives. An adjournment was given for the prosecutor to present authority for midtrial substitution of a factfinder.

The hearing was continued until July 28, 1992, at which time the prosecutor argued that defense counsel was correct in his argument that the court should declare a mistrial, and that manifest necessity allowed for retrial: "I questioned whether you had to grant a mistrial. At that point, your Honor, I looked into it. The defense said you had to grant a mistrial. I agree,

your Honor, I looked into it. The defense said you had to grant a mistrial and assign it for trial."

Defense counsel responded, "I don't think you have any choice about that." At that point the Court formally declared a mistrial, and the issue became whether the Double Jeopardy Clause barred retrial.

The Chief Judge issued a written opinion dated September 25, 1992 granting the defendant's motion to dismiss on double jeopardy grounds. The People filed a Claim of Appeal on October 9, 1992 in the Michigan Court of Appeals appealing Judge Roberson's decision. Leave was granted and on January 7, 1993, the Michigan Court of Appeals issued a Per Curiam Opinion citing People v Hicks, 201 Mich App 197, 506 NW2d 269 (1993) (reversed 445 Mich 861, 519 NW2d 158 (1994) affirming the lower court decision finding

that jeopardy has attached, thus barring retrial.

The People filed an Application for Leave to Appeal in both the Hicks case, and the subject Bellew case to the Michigan Supreme Court which was granted on April 20, 1994. Leave was granted and the Hicks and Bellew cases were consolidated.

On December 30, 1994, the Michigan Supreme Court in a fractured opinion reversed the decision in Hicks, sending the case back for trial, finding that the manifest necessity for declaration of a mistrial was primarily dependent on the alternate judge's scrupulous exercise of discretion in considering and providing alternatives to declaration of a mistrial. Defendant's "justified" refusal to proceed constituted the manifest necessity for a mistrial.

In Bellew, manifest necessity was not found where the Michigan Supreme Court found that the Chief judge did not scrupulously exercise judicial discretion, and unexplored options existed which the Supreme Court opined did not justify the declaration of a mistrial on the grounds of manifest necessity. The majority opinion did not recognize that the defendant consented to the mistrial.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court decision in Bellew has misconstrued the U.S. Supreme Court decisions interpreting Double Jeopardy protection and the manifest necessity exception to the rule precluding retrial. In Bellew, the defendant himself requested the mistrial, and on appeal claimed that retrial was barred because the mistrial was not necessary. The Michigan Supreme Court erroneously opined that a finding of manifest necessity is dependent primarily on

a requisite exhaustion of all options and alternatives provided to the defendant.

When the trial judge recused herself and refused to proceed any further, the defendant was cognizant of his two alternatives: To continue the trial before a new factfinder either by the factfinder reading the transcripts or recalling the witnesses anew before the new factfinder. Defendant objected to the recusal and the reassignment of the "in progress" case. The defendant who consented to and requested the mistrial then resurrected his waived claim and successfully argued that the state is barred from retrial because the mistrial was not necessary.

The rule set forth by this Court: "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's

motion is necessitated by prosecutorial or judicial error." United States v Dinitz, 424 US 600, 607; 96 SCt 1075; 47 LEd 2d 267 (1976);, Oregon v Kennedy, 456 US 667, 672-673; 102 SCt 2083; 72 L Ed 2d (1982).

This Court opined that where the trial was aborted with the defendant's consent, a second trial is precluded only "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial. . . ." Dinitz supra.at 676. In the instant case, the record does not substantiate any such intent, and the defendant's request for the mistrial waived the bar to double jeopardy. The Michigan Supreme Court majority erred in determining that the defendant could not be retried. The dissenting opinion of Justice Boyle succinctly synopsized the correct interpretations of the manifest necessity exception to double jeopardy that allows for retrial under the facts at issue.

Retrial is not dependent solely upon the subjective standard of the alternatives offered by the reviewing court as the majority erroneously held.

Petitioner submits that this is an issue of national significance where the trial judge's midtrial recusal (when the judge determines that she cannot and will not proceed any further), is tantamount to a disability where the trial judge becomes ill and is unable to proceed. Where the trial judge refused to proceed any further and afford both parties their right to a full and fair trial, the manifest necessity for a mistrial exists and is a second reason to allow retrial.

An important distinction exists between the definition of mistrial and a new trial. Black's Law Dictionary, (4th Ed) p. 1675 defines a new trial as "[a] re-examination

of an issue of fact in the same court after trial and a decision by a jury or court by referees." Mistrial is defined in pertinent part in Blacks Law Dictionary, (5th Ed) p. 903 as "an erroneous, invalid, or nugatory trial. A trial of an action which cannot stand in law because of....disregard if some other fundamental requisite before or during trial.... The judge may declare a mistrial because of some extraordinary event, for prejudicial error that cannot be corrected at trial..." A general exception has been recognized where the defendant made a motion for a mistrial, or the mistrial was granted with the defendant's consent.

The policy behind the rule, universally followed in this country, that retrial is permissible following a mistrial occasioned by the refusal of the trial court to proceed any further in a case, short of a verdict for either acquittal or conviction, is

sound; indeed, persuasive on point. Illustrative of "manifest necessity" are a line of cases involving midtrial mistrials. The opinion for the Court by Justice Black in Wade v Hunter, 336 US 684, 69 SCt 834; 93 L Ed 974 (1949) "is one example" (See also [Thompson v United States, 115 US 271; 15 S Ct 73, 39 L Ed 146 (1894)] is one example. In Hunter, the defendant was tried before a military tribunal during the war, but the case ended during trial and started anew due to the advance of the army during trial. A claim was raised that jeopardy barred the conviction at the second proceeding (indeed that it barred the second proceeding). In upholding the verdict, Justice Black stated:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of

> oppressive practices at which the double-jeopardy prohibition is aimed. . . 93 LEd at 978.

In both Simmons v United States, 142 US 148; 35 L Ed 968; 12 S Ct 171 (1891) and Illinois v Sommerville, 410 US 458; 35 LEd 2d 425; 93 SCt 1066 (1973), it was held by this Court that retrial was permissible after midtrial mistrials where to hold otherwise would have been to "defeat the ends of public justice," those ends being insuring fair trials resulting in just verdicts.

Further, in Arizona v Washington, 424 US 497; 54 LEd 2d 717; 98 SCt 824 (1978) retrial was held permissible where after a mistrial was declared at the behest of the prosecution because of a defense error injurious to the prosecution case. The Court observed that a defendant having his case tried to finality by one factfinder may not always be possible:

> "Because of a variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by the particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Id. at 54 L Ed 2d at 728.

In his plurality opinion in United States v Jorn, 400 US 470; 27 Led 2d 543; 91 S Ct 547 (1971), Justice Harlan also touched on the protections afforded by the jeopardy prohibition. Justice Harlan observed that "the Double Jeopardy clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense." 27 L Ed 2d at 556.

The policy behind the jeopardy

prohibition, then as it has developed over the years, is to bar retrial after acquittal, to bar retrial in a separate case after conviction, and to bar retrial after termination of a trial not caused by manifest necessity, so as to prohibit judicial or prosecutorial overreaching, and avoid oppression of the accused through harassment. However, the rule of manifest necessity recognizes that a public interest is involved in the prosecution of criminal cases; that is the interest in seeing those guilty of crimes punished after fair trials.

In other words, there is a public interest in fair trials being brought to just verdicts-- to a conclusion of determination of guilt or innocence. Sound policy demands that this Court not depart from a rule followed throughout almost its entire history by the entire nation. Justice dictates that the People are

entitled to a full and fair trial, before an impartial factfinder. Disclosure by the Court prior to trial would have been appropriate and avoided the consequences had they been known prior to trial.

Justice cannot be subject to the People's fortuitous discovery of a conflict only prior to trial. If a defendant successfully has witnesses or the jury sworn, the defendant prevails and can hide behind the double jeopardy protection to afford himself an advantage of more than a "fair trial". The appearance of impropriety was reason enough for the factfinder in this case to immediately recuse herself, and refuse to proceed any further. A defendant is not entitled to inuring the superior advantageous benefit once the appearance of impropriety is brought to light.

Viewing such questionable circumstances with a cynical eye, a judge has the capacity

to grant a defendant the ultimate favor if judicial refusal to proceed was found not to constitute manifest necessity where the test set forth by this court is fully met. Dinitz, supra.[1] An appellate tribunal ought to be appropriately hesitant to reverse the finding of a judge who determines that she cannot proceed. The trial judge in the instant case determined that she was unable to fairly render any further rulings in the case whatsoever, and refused to even declare a mistrial for that reason.

This court must not create a contrary rule, a rule which would, reiterating the words of Justice Black, "create an

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[1] Without making any specific allegations of the intent of the trial judge or judicial misconduct in the instant case, Petitioner suggests that the mere appearance of impropriety and or the inference does exist in this case. The trial judge's actions although presumptively innocent, can be construed to have been for the purposes of aiding the defendant in avoiding criminal penalties and the judicial process for his criminal actions.

insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy protection is aimed..." This Court must not ignore the societal interest involved here, and deprive the prosecution of one complete opportunity to convict those who have violated the law at a fair trial before an impartial factfinder.

The reasons for the trial judge's recusal became irrelevant once the judge recused herself and are not at issue in this case. Rather, the issue becomes how to proceed when the trial judge will not go forward. It is exigent that the manifest necessity exception be appropriately applied and interpreted as the United States Supreme Court has directed. Clearly, the double jeopardy clause prevents "governmental overreaching, and protection of the

defendant from harassment". No such proscribed conduct occurred in this case, rather the defendant has successfully managed to manipulate, hide and avoid criminal sanctions for his actions behind the double jeopardy protection that he waived by his consent prior to declaration of the mistrial.

Moreover, judicial integrity demands maintaining the established homeostasis balancing the defendant's constitutionally protected rights with the prosecution's and society's right to a full and fair trial. There is no authority from this Court intending to support the result of the Michigan Supreme Court's decision barring retrial of the defendant. Failure to accept the merits of the People's appeal would deny the State the opportunity to fairly avail itself of a right to a full and fair trial and would erroneously interject a subjective

standard of the reviewing court finding the least drastic available remedy into the equation of determining manifest necessity for a mistrial. Further, it would expand the constitutional protections afforded to defendants. Such a result would be a dangerous precedent affording and creating a "loophole", an unfair tactical advantage allowing circumvention of the established manifest necessity exception to the double jeopardy clause annunciated by this Court.

The State would be precluded from having its right to a fair trial resulting in a just verdict, the ends of public justice would be defeated and the justice system impugned. Public confidence in the United States judicial system is paramount. It is erroneous to find that manifest necessity is required where defendant consented to the mistrial. The manifest necessity exception as annunciated by this

court exists and is not dependent solely on the requisite finding of a mistrial being the "least drastic remedy" available.[2]

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[2] This is a classic form over substance example where there are no simple magic words available. Each case must be assessed on its own facts and merits. Deference should be given to a judge who acknowledges the appearance of improperly fully knowing the facts and circumstances that an appellate tribunal cannot determine from a cold record and the judge decides that she is unable to proceed. Cf. Analogously, the precise words employed by a police officer in effectuating an arrest are not controlling as to whether probable cause exists (i.e. an arrest for "investigation" is not per se invalid. Rather, the question is whether the objective circumstances demonstrate probable cause. Scott v United States, 436 US 128, 56LEd 2d 168, 98 SCt 1717 (1978).

CONCLUSION

WHEREFORE, Petitioner respectfully submits that for the aforementioned reasons, plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

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Dated: March 20, 1995
TAB/KMW/edb

APPENDIX A

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice
Michael F. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

SYLLABUS

This syllabus was prepared by the Reporter of Decisions.

PEOPLE v HICKS
PEOPLE v BELLEW

Docket Nos. 97552, 98753. Argued October 5, 1994 (Calendar Nos. 6-7) Decided December 30, 1994.

Tyrone Hicks was charged in the Detroit Recorder's Court with assault with intent to murder and possession of a firearm during the commission of a felony. During a bench trial before Judge Daphne, after three witnesses had testified, the prosecutor discovered that the defendant's brother had been

the judge's campaign manager. Thereafter, Judge Curtis recused herself without expressly declaring a mistrial. The case was assigned to Terrance Boyle, J., who offered the defendant the option of continuing the trial. After the defendant refused the offer, Judge Boyle declared a mistrial, but denied the defendant's motion to dismiss on double jeopardy grounds, reasoning that Judge Curtis' recusal was the functional equivalent of a mistrial based on manifest necessity. The Court of Appeals, Fitzerald, P.J., and Michael J. Kelly, J. (J. T. Hammond, J., dissenting), reversed, dismissing the case, and concluding that there was no manifest necessity to declare a mistrial (Docket No. 149026). The people appeal.

Rodney Bellew was charged in the Detroit Recorder's Court with receiving and concealing stolen property in excess of

$100. A bench trial before Judge Daphne Curtis was continued after two witnesses had testified. In the interim, the prosecutor moved to disqualify the judge, alleging that the defense attorney was associated in the practice of law with Judge Curtis' spouse. The judge recused herself over the objection of defense counsel and a defense request for an evidentiary hearing. Thereafter, Chief Judge Dalton Roberson declared a mistrial and granted the defendant's motion to dismiss, holding that retrial was barred by the Double Jeopardy Clause. The Court of Appeals, Jansen, P. J., and White and K. N. Hansen, JJ., affirmed in an unpublished opinion per curiam (Docket No. 157434). The people appeal.

In separate opinions, the Supreme Court reversed the decision of the Court of Appeals in Hicks and remanded

the case for retrial, and affirmed the decision of the Court of Appeals in Bellew.

Justice Griffin, joined by Justice Mallett, stated that Judge Curtis', recusal and refusal to continue in these cases is analogous to a midtrial disability suffered by the presiding judge. The determination whether manifest necessity existed to justify a mistrial necessarily depends on whether a scrupulous exercise of discretion by the successor would have revealed reasonable alternatives to declaring a mistrial. In Hicks, because Judge Boyle properly considered available alternatives to declaring a mistrial, the defendant's justified refusal of the proffered alternatives constituted manifest necessity for the mistrial, and he should be retried, consistent with double jeopardy protections. In

Bellew, retrial should be barred by the Double Jeopardy Clause.

In a bench trial, jeopardy attaches once the court begins to hear evidence. Retrial is not barred when a defendant moves for or consents to a mistrial and the consent was not precipitated by prosecutorial or judicial goading. In addition, retrial is permitted when a mistrial was occasioned by manifest necessity. Determining whether manifest necessity exists to justify a mistrial requires a balancing of the defendant's interest in completing the trial in a single proceeding before a particular tribunal with the strength of the justification for a mistrial. Trial judges must not declare a mistrial until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the

proceedings. Each case necessarily depends on its particular facts, with any doubts resolved in favor of the defendant.

In these cases, jeopardy and attached, and, thus, retrial would be barred unless the defendants consented or manifest necessity justified declaration of a mistrial. Neither defendant consented to a mistrial. Judge Curtis' midtrial recusal and refusal to further participate presented a situation not unlike that created by the midtrial disability of a trial judge.

In Hicks, Judge Boyle offered to preside over the completion of the defendant's trial or to declare a mistrial. While the option to complete the trial was designed to protect the defendant's interest in terminating the proceedings, once begun, it could not

restore his right to have his trial completed by a particular tribunal. Once he rejected the option, Judge Boyle had no choice but to declare a mistrial. Under these circumstances, retrial will not contravene the protections afforded by the Double Jeopardy Clause.

In Bellew, the chief judge did not engage in a scrupulous exercise of discretion. While it is arguable that no reasonable alternative existed and it was probable that the defendant would have refused any alternative offered, such speculation cannot support a conclusion that manifest necessity existed. Because options existed and remained unexplored, manifest necessity did not exist to justify the mistrial.

Justice Brickley concurred only in the result.

Chief Justice Cavanagh, joined by Justice Levin, concurring in part and dissenting in part, stated that a reasonable alternative to mistrial existed, i.e., a hearing regarding whether recusal was required, and that the cause of the mistrial was not outside the control of the prosecutor in Hicks and the trial judge in Bellew.

Double jeopardy protections require balancing a defendant's interest in having guilt or innocence decided in one proceeding against society's interest in affording the prosecutor full and fair opportunity to present evidence. Retrial may be had where a innocent error outside the prosecutor's or judge's control results in a mistrial or where a mistrial results from manifest necessity. Where the mistrial is not manifestly necessary, double jeopardy bars retrial. Before a

trial judge, sua sponte, declares a mistrial, explicit findings should be made, after a hearing on the record, that no reasonable alternative exists.

In these cases, the real cause of each trial's termination was the trial judge's recusal without justification, and the cause was within the control of the prosecutor or the trial judge.

Justice Riley, concurring in part and dissenting in part, stated that in Hicks, the defendant did not consent to a mistrial. Because there existed a manifest necessity to declare a mistrial, retrial of the defendant does not violate the Double Jeopardy Clause. Justice Boyle, joined by Justice Riley, dissenting, stated that in Bellew, the defendant's request for the mistrial lifted the bar to double jeopardy because his request was not intentionally provoked by the

prosecution. Because the mistrial was declared at his request, the state need not justify the declaration. The manifest-necessity strand of double jeopardy analysis applies where a mistrial is granted over the defendant's objection. Because counsel resisted any alternative, the chief judge had no other choice but to grant a mistrial.

To require a judge to explore alternatives available to a defendant may be appropriate where the cause of a mistrial is subject to manipulation by the prosecutor, and the defendant asserts feasible alternatives to a mistrial. However, where the trial has begun and the cause of the mistrial is not one that the prosecutor has manipulated to avoid an acquittal, the defendant's interest in completing the proceedings is subordinate to the

public interest in affording the prosecution one full and fair opportunity to present the evidence to an impartial factfinder. Where the situation triggering mistrial is potential bias of the factfinder, the trial court's exercise of discretion in declaring a mistrial is entitled to the highest deference.

Hicks, reversed and remanded.

Bellew, affirmed.

201 Mich App 197; 506 NW2d 269 (1993) reversed.

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice
Michael F. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

OPINION

FILED DECEMBER 30, 1994

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

No. 97552

TYRONE HICKS,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

No. 98753

RODNEY BELLEW,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH
GRIFFIN, J.

We are required in each of these consolidated appeals to determine whether the constitutional bar against double jeopardy precludes retrial after a judge has recused herself in middle of a bench trial and the successor judge has declared a mistrial. Our answer turns on the scope of the manifest-necessity exception to the

double jeopardy bar and its application to the particular facts presented. We conclude that the Double Jeopardy Clause allows retrial of defendant Hicks, be precludes retrial of defendant Bellew. Accordingly, we would reverse the Court of Appeals decision in People v Hicks,[1] and we would affirm its decision in People v Bellew.[2]

I

Both cases arise out of bench trials presided over by Judge Daphne Curtis of the Detroit Recorder's Court, and involve her failure before trial to disclose a relationship with one of the parties. In each case, the prosecutor learned of the relationship and directed the court's attention to this information after several witnesses had testified. A midtrial dilemma ensued when the judge abruptly recused

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[1] 201 Mich App 197; 506 NW2d 269 (1993).
[2] Unpublished opinion of the Court of Appeals, issued January 7, 1994 (Docket No. 157434).

herself and refused to participate further in either trial.

A. People v Hicks

Defendant Hicks was charged with assault with intent to murder[3] and possession of a firearm during the commission a felony[4] in a bench trial that commenced on September 9, 1991. During the lunch recess, after three witnesses had testified, the assistant prosecutor discovered that defendant's brother was Gregory Hicks, a friend of Judge Curtis who had served as her campaign manager when she was elected to judicial office. After the lunch recess, the assistant prosecutor brought this fact to the attention of Judge Curtis. She admitted that a person named Gregory Hicks had been her campaign manager and friend for the last ten years, and then she invited the parties to comment on their

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[3] MCL 750.83; MSA 28.278.
[4] MCL 750.227b; MSA 28.424(2).

respective positions.

Defense counsel argued against the judge's recusal, indicating that Gregory Hicks would not be a witness in a case. The assistant prosecutor declined comment. Judge Curtis then recused herself.

Shortly thereafter the parties appeared before Judge Terrance Boyle.[5] He offered to continue the trial before him, but defendant rejected this proposal. Judge Boyle then entered a mistrial "as an official thing to clean up what happened there," and he denied defendant's motion to dismiss the case on double jeopardy grounds, reasoning that Judge Curtis' recusal after acknowledging that she might be affected by her knowledge of the questioned relationship was the functional equivalent of a mistrial prompted by manifest necessity.

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[5] Judge Curtis had telephoned Judge Evans, the acting chief judge, and informed him of her recusal. Judge Evans assigned the case to Judge Boyle, the alternate for Judge Curtis.

A divided panel of the Court of Appeals reversed and dismissed the case, concluding that "manifest necessity [did not exist to warrant] a mistrial over defendant's objection and the state is barred from placing defendant in jeopardy a second time on these charges." 201 Mich App 197, 203-204; 506 NW2d 269 (1993).

In a vigorous dissenting opinion, Judge Hammond posited that if Judge Curtis had dropped dead, fallen ill, or become disabled during the course of the trial, no one would dispute that manifest necessity justified a mistrial. He deemed the situation resulting form Judge Curtis' recusal analogous to "a breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified to sit . . . ." Gori v United States, 367 US 364, 372; 81 S Ct 1523; 6 L Ed 2d (1961) (Douglas, J., dissenting). Id. at 206.

We granted the prosecutor's application

for leave to appeal. 445 Mich 861 (1994).

B. People v Bellew

A retrial of defendant Bellew on a felony charge of receiving and concealing stolen property in excess of $100[6] commenced on June 9, 1992.[7] After two witnesses had testified, the trial was continued until June 23, 1992.

During the interim, the prosecutor filed a motion to disqualify Judge Curtis, alleging that the defense attorney was "in some way associated in the practice of law" with Judge Curtis' spouse. The motion

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[6] MCL 750.535; MSA 28.803.

[7] In his initial trial before the same Judge Curtis in September 1991, defendant had been convicted of one count of receiving and concealing stolen property in excess of $100, a felony, and four counts of concealing or misrepresenting the identity of a motor vehicle without intent to mislead, a misdemeanor. Following his conviction, defendant retained new counsel and moved for a new trial, alleging ineffective assistance of counsel. Judge Curtis granted the motion with respect to the felony conviction. Actions that transpired at the retrial are the subject of this appeal.

focused on Judge Curtis' ethical obligation to disclose this alleged relationship, and her failure to do so. Defense counsel answered by challenging the grounds for disqualification and requesting Judge Curtis to deny the motion or hold an evidentiary hearing. Counsel argued that "[w]hether that relationship would provide a basis under these circumstances for this Court to recuse itself on the vague generalization is unsubstantiated, " and that in light of the "substantial constitutional interests involved, it was "an outrage" for the prosecution to file this motion. Stating that she had not engaged in any misconduct, Judge Curtis nonetheless recused herself to insure that both sides felt "their rights are protected and that impartiality is assured . . . ." She declined to address defendant's request for an evidentiary hearing, choosing instead to refer the matter to Chief Judge Dalton Roberson.

The chief judge declared a mistrial, and then granted defendant's motion to dismiss, holding that retrial was barred by the Double Jeopardy Clause.

A unanimous panel of the Court of Appeals upheld the chief judge's decision, concluding that, while manifest necessity is an elusive concept, with considerable deference being accorded a trial court's application of this concept, such deference could not operate to cloak the mere appearance of impropriety under the umbrella of manifest necessity.[8] Unpublished opinion per curiam, issued January 7, 1994 (Docket No. 157434).

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[8] The Court distinguished between Judge Roberson's granting of the mistrial and his dismissal of the charges on double jeopardy grounds, holding that the prosecutor had appealed only the latter, not the former. Consequently, the Court of Appeals did not address whether Judge Roberson should have or could have sent the case back to Judge Curtis.

We granted the prosecutor's application for leave to appeal, and ordered that this case be argued and submitted with People v Hicks.[9]

II

Under both the Michigan [10] and the federal[11] constitutions, an accused cannot be placed in jeopardy twice for the same offense. [12] Jeopardy attaches "once the defendant is put to trial before the trier of fact, whether [it] be a jury or a judge."

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[9] 445 Mich 862 (1994).

[10] Const 1963, art 1, Sec. 15.

[11] US Const, Am V, applicable to the states through the Fourteenth Amendment. Benton v Maryland, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

[12] It has often been said that the double jeopardy guarantee consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. North Carolina v Pearce, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971). In a bench trial, jeopardy attaches once the court begins to hear evidence. Serfass v United States, 420 US 377, 388; 95 S Ct 1055; 43 L Ed 2d 265 (1975).[13]

An oft-repeated statement of the reasons justifying this protection is set forth in Green v United States, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 199 (1957), where the Court said:

> The underlying idea, on that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Despite the concern for repeated prosecutions, it is axiomatic that retrial

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[13] In a jury trial, jeopardy attaches once the jury is impaneled and sworn. Id. at 388.

is not automatically barred whenever circumstances compel the discharge of a factfinder before a verdict has been rendered.

One exception to the double jeopardy bar arises when a defendant moves for or consents to a mistrial. In United States v Dinitz, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976), the Supreme Court held that

> "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to removed any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."[14]

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14 In United States v Dinitz, supra, the defendant's attorney was expelled for misconduct, and the trial judge offered three options to the defendant: proceed with co-counsel, take a continuance to appeal the expulsion of his attorney of choice, or have a mistrial declared. The defendant opted for the mistrial, then later argued that retrial was barred on double jeopardy grounds. The Supreme Court disagreed, holding the defendant had consented to the mistrial.

Consequently, retrial is not barred whenever a defendant has consented to a mistrial and the consent was not precipitated by prosecutorial or judicial goading. 15

In addition to the consent exception, the Supreme Court has consistently maintained that retrial is permitted when the mistrial was occasioned by manifest necessity. The classic formulation of the test to be applied in determine whether retrial is permissible was articulated by Justice Story in United States v Perez, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824):

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15 See Oregon v Kennedy, 456 US 667, 676; 102 S Ct 2083; 72 L Ed 2d 416 (1982) (the Double Jeopardy Clause bars retrial when the prosecutor intended to provoke the defendant into requesting a mistrial, or when the prosecutor intends "to subvert the protections afforded by the Double Jeopardy Clause"); People v Dawson, 431 Mich 234, 253; 427 NW2d 886 (1988) ("Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant may not, by moving for a mistrial, have waived double jeopardy protection").

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .

The impetus behind this rule was the recognition that even personal security and freedom from governmental harassment should not be purchased at the high cost of barring all retrials following a mistrial declared without the defendant's consent. Jorn, supra at 480. The Supreme Court has stated:

> [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. [Wade v Hunter, 336 US 684, 689; 69 S Ct 834; 93 L Ed 974 (1949).]

Determining whether manifest necessity exists to justify the declaration of a

mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification for a mistrial. Recognizing the tension between these two concerns, the Supreme Court has held that the Perez doctrine commands trial judges to refrain from declaring a mistrial until "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." Jorn, supra at 485.[16] Each case necessarily

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[16] In United States v Jorn, the defendant was charged with wilfully assisting in the preparation of fraudulent tax returns.

At trial, the prosecution attempted to elicit testimony from a taxpayer who had allegedly aided the defendant in the preparation of his return. Defense counsel suggested that the witness be informed of his constitutional rights, and the judge complied. Despite the witness' willingness to testify, the judge prohibited such testimony before the witness had consulted an attorney, and then aborted the trial to enable the witness to obtain such consultation.

depends on its own particular facts. Illinois v Somerville, 410 US 458, 464; 93 S Ct 1066; 35 L Ed 2d 425 (1973)

Despite the command to decide each case on its own facts, the Supreme Court in Somerville concluded it was possible to distill some general rules from individual cases, premised on the "public justice" prong articulated in Perez. The Somerville Court had determined there was manifest necessity for a mistrial where under local law, a defect in the indictment neither could be cured by amendment nor waived by the defendant. The Court held that a trial judge properly exercises discretion to declare a mistrial when an impartial verdict cannot be obtained, or when a guilty verdict

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16 Cont.
On a pretrial motion before retrial, the judge dismissed the information on the basis of former jeopardy. In a plurality opinion, the Supreme Court upheld this dismissal, concluding that manifest necessity did not exist to justify the mistrial, since a continuance would have enabled the witness to seek legal counsel.

could be returned by would be reversed on appeal because of an obvious procedural error occurring during the trial. Any doubts concerning the existence of manifest necessity should be resolved in favor of the defendant. Downum v United States, 372 US 734, 738; 83 S Ct 1033; 10 L Ed 2d 100 (1963). With these considerations in mind, we turn to the cases at bar.

III

As a preliminary matter, we not that in both of the cases at bar, Judge Curtis' recusal occurred after several witnesses had testified. Jeopardy had thus attached.[17] Consequently, retrial would be barred in either case in the absence of consent by the defendant or manifest necessity justifying the mistrial.

A.

We cannot conclude that the defendant

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[17] Serfass v United States, supra at 388 (in a bench trial, jeopardy attaches once the court begins to hear evidence).

in either case consented to the mistrial. Both defendants adamantly opposed Judge Curtis' decision to recuse herself and expressed their desire to continue with the chosen factfinder. Accordingly, consent cannot be derived from defendants' actions surrounding Judge Curtis' recusal.

Moreover, we decline to extract consent form defendant Hicks' justifiable refusal to accept the alternatives proffered by Judge Boyle[18] or from a motion by defendant Bellew for declaration of mistrial[19] and

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18 The alternatives included a continuation of the trial before Judge Boyle, with Judge Boyle either reading the earlier transcripts, or recalling the witnesses plus the option of having a mistrial declared.

19 Defendant's motion, presented to Chief Judge Roberson, read in part as follows:

> 18. Defendant respectively maintains that your honor is without jurisdiction in this matter, there having not been a mistrial declared.
>
> 19. Assuming arguendo, the absence of a jurisdictional issue, this matter

to dismiss. We note that the hallmark of consent is the defendant's retention of primary control over the course of his trial. Dinitz, supra at 609. The consent Dinitz envisioned manifests itself in a defendant's decision to forgo taking his

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should be dismissed on double jeopardy or related grounds.

20. Actually, defendant requests that the case be sent back to Judge Curtis for the declaration of a mistrial and then reassigned to another judge or to the Chief Judge for sentencing.

21. The record in this matter does not support the grant of the prosecutor's motion for disqualification. In fact, it barely supports the request for a hearing into the matter, which is what the prosecutor should have sought.

22. In granting the prosecutor's motion, the judge effectively declared a mistrial. Therefore, Count 1 should be dismissed and retrial barred because there was no manifest necessity for the mistrial.

Wherefore, for the foregoing reasons, defendant requests that a mistrial be declared on this count and that retrial [be] barred on double jeopardy grounds.

case "'to the first jury and perhaps, end the dispute then and there with an acquittal.'" Dinitz, supra at 608, quoting United States v Jorn, supra at 484.[20] A careful reading to the record, however, compels the conclusion that neither defendant opted to forgo a ruling by Judge Curtis on his guilt or innocence.[21] In fact, both defendants opposed her

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20 The Dinitz Court observed

> Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire :to go to the first jury and, perhaps, end the dispute then and there with an acquittal." United States v Jorn, supra, at 484. Our prior decisions recognize the absence of circumstances of manifest necessity requiring a sua sponte judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. [Id. at 608 (emphasis added).]

21 We think it pertinent to note that during oral argument before this Court, even the prosecutor disavowed any reliance on consent.

recusal. In this sense, Judge Curtis' recusal did not comport with the expressed desires of either defendant.[22] Because Judge Curtis' recusal extinguished defendants' option to" go to the first

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[22] Unlike other trial errors, a judge's decision sua sponte to recuse herself after jeopardy has attached in a bench trial deprives a defendant of the option to obtain a verdict from the first factfinder. Despite the dissent's characterization of this sentence as "constitutionally irrelevant," we believe it becomes irrelevant only when viewed within the context of the dissent's erroneous assumption that the protections of the Double Jeopardy Clause do not encompass defendant's right to obtain a verdict from the first factfinder. While such a right is not absolute, it is entitled to constitutional protection under Wade, supra at 689, and Arizona v Washington, 434 US 497, 509; 98 S Ct 824; 54 L Ed 2d 717 (1978).

Without citing any authority, the dissent asserts that "[u]nder the view that has attained a majority of votes at the Supreme Court, it appears that a defendant's value right to a particular tribunal is merely an incident of the defendant's more generalized interest in being able to complete the trial itself." Slip op at 13. As discussed above, however, this conflicts with language in Wade, supra at 689, Washington, supra at 509, and the plurality opinion in Jorn.

defendants' option to" go to the first jury," we cannot conclude that either of the defendants consented to a mistrial.[23]

Moreover, in Bellew, we believe it would be patently unfair to construe defendant's motion for declaration of

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23 We note, however, that a different result would obtain, at least with respect to defendant Hicks, were we to conclude that defendant's protected double jeopardy interest encompassed only the right to a completed trial, and not a completed trial before a particular tribunal. See Western & Drubel, Toward a general theory of double jeopardy, 1978 Sup Ct R 81, 84.

Western and Drubel have suggested that the Double Jeopardy Clause serves an interest in finality that is not inextricably bound to any particular tribunal. More specifically, the authors assert:

> A defendant has a valued right to have his trial completed by a particular tribunal, not because he has a constitutional interest in the identity of any particular tribunal, but because he has an interest in being able "to conclude his confrontation with society" once it has begun . . . . To that extent, the defendant's interest in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. [Id. at 90.]

The authors' theory, however, cannot be reconciled with the language in the plurality opinion in Jorn, Supra at 486:

mistrial and for dismissal as consent to the mistrial, in light of defendant's vigorous objection to Judge Curtis' recusal. Defendant's motion evidenced his belief that the functional equivalent of a mistrial had occurred upon Judge Curtis' recusal.

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23 Cont.

> [In] the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. [Emphasis added.]

Several leading commentators have also recognized that the defendant's interest lies in the completion of the trial before a particular tribunal. See LaFave & Israel, Criminal Procedure (2d ed), p 1057:

> [T]he Court recognized as a aspect of jeopardy bar the protection of "the defendant's 'valued right' to have his trial completed by a particular tribunal." Implicit in this protection is the recognition not only that there must be a barrier to prosecution manipulation of a trial termination to give it another chance, but also that termination of the trial without verdict may hurt the defendant even without such manipulation. Every jury has its own character and the jury lost may be more favorably disposed to the defendant than the next jury. [Citations omitted.]

Although we reject this view today, we decline to transform defendant's attempted clarification of the recusal into consent for a mistrial occasioned by an event outside of defendant's control.

B

With respect to the manifest-necessity exception to double jeopardy, we heed the counsel provided by the United States Supreme Court in Somerville, supra, to decide each case on the basis of its own unique factual setting. We find instructive the analysis employed by the dissenting Court of Appeals judge in Hicks. Our focus must be on what actually occurred at the trial court level. Accordingly, we turn to a more detailed examination of the factual setting of each of these cases.

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23 Cont

Consequently, we do not proceed on the assumption that a defendant's "valued right to have his trial completed by a particular tribunal" is merely incidental to his primary interest in finality. For this reason, defendant Hicks rejection of Judge Boyle's offer to complete the trial cannot constitute consent to the mistrial.

1

a. People v Hicks

As noted above, despite opposition to recusal expressed by counsel for defendant Hicks, Judge Curtis recused herself after the assistant prosecutor discovered and called attention to the judge's relationship with defendant's brother. Judge Curtis expressed her reasoning:

> All right. The problem with sitting as a judge, particularly in a waiver trial is that not only do I have to be concerned about whether I might be influenced in my rulings or in my findings by knowing someone in the defendant's family but also whether or not it looks improper, the appearance of impropriety and the Cannons [sic] refer to both of those situations as it applies to judges. I might be influenced by knowing his brother now that I know that I know his brother. I don't really think that I would be, but I think just as important is the fact that it would not look good, that the appearance of impropriety certainly result from my continuing as the trier of fact in this case. . . . I don't think that it is proper for the Court to continue in this case for the reasons that I have just stated and I don't think it's proper to dismiss the case either.
> [Emphasis added.]
>
> * * *
>
> I am not necessarily in agreement that [the assistant prosecutor] created the mistrial . . . .

> I think the better way of resolving this is to recuse myself, disqualify myself from further proceedings in this matter and to refer the matter to the chief judge. . . to determine whether or not this case should be dismissed or a mistrial declared because I suppose one might argue that my decision regarding a dismissal or mistrial might be influenced by my knowledge of the defendant's brother, or my knowing the defendant's brother.

Judge Curtis recused herself, and shortly thereafter the parties appeared before Judge Boyle, to whom the case was assigned.[24]

After reviewing what had transpired in Judge Curtis' court, Judge Boyle concluded that a mistrial had not been formally declared; he discerned that neither party desired a mistrial, and then he observed:

> That leaves a number of options open. I could continue with that trial and use the transcript, or we could continue with the trial and have all the witnesses recalled before me, or I could declare a mistrial and the defendant could then decide as a matter of a new trial whether to have a jury or a bench trial in front of me. That option in my view goes exclusively to the defendant.

Defense counsel responded by stating:

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[24] See n. 5.

> It would be our position that the Court really doesn't have the options of continuing the case from where it left off or recalling the witnesses. We believe that once Judge Curtis recused herself, that is a technical declaration of a mistrial.[25]

Judge Boyle stated that "what [Judge Curtis] did was the functional granting of a mistrial whether or not she used the words . . . " He entered a mistrial "as an official thing to clean up what happened there," but he denied defendant's motion to dismiss, concluding that Judge Curtis' expressed discomfort with the situation justified her recusal.:

> I wouldn't have done what she did, I've already made that perfectly clear. But I'm not gonna say that what she did was wrong . . . where a judge can certify

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[25] Defense counsel continued:

> And we would say that it follows the rationale of People versus Little, [180 Mich App 19; 446 NW2d 566 (1989)] and in fact that . . . we elected to have the case heard before her and in fact it was heard before her, and that any action that she took to recuse herself, although she did not specifically state that she declared a mistrial, in fact created a mistrial.

on the record that the judge says there is a manifest necessity for me to excuse myself from continuing as a fact-finder in this case, an appellate tribunal ought to be pretty loathe to say that's not manifest necessity if the judge thinks its manifest necessity.

And for that reason, I'm gonna deny the motion to dismiss on grounds of double jeopardy. . . .

b. People v Bellew

In Bellew, after the trial had begun and witnesses had testified, Judge Curtis granted the assistant prosecutor's motion for disqualification, which alleged that the defense attorney and the judge's spouse were somehow associated in the practice of law.[26] Judge Curtis referred the matter to the chief judge without holding a hearing on the allegations.

The parties immediately appeared before the chief judge, where they agreed that

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[26] The motion alleged that the defense attorney at the judge's spouse listed the same address, including identical suite numbers, and that a telephone call to Judge Curtis' spouse's office seeking defense counsel received the reply that defense was not in, but would return the call.

Judge Curtis had not declared a mistrial.[27] The prosecutor focused on Judge Curtis' statement that she was "simply referring to Chief Judge Roberson for assignment,"[28] and argued that a successor judge should continue the trial. The chief judge told the prosecutor to find case authority for substituting a judge midtrial, or he might send the case back to Judge Curtis.

When the parties appeared again before the chief judge, the prosecution agreed that a mistrial had to be granted, but asserted

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27 This was clear from a question that had been put to Judge Curtis by defense counsel:

> Mr. Pookrum: Your Honor, may we, may I understand what the actual status is. Is the Court in effect granting a mistrial?
>
> The Court: No, I am simply referring [sic] it to Chief Judge Roberson for assignment.

28 Judge Curtis stated that the chief judge would "do whatever, hear any motions, or send it to the appropriate judge for hearing of motions. I am simply granting the motion filed by the People."

that retrial should be permitted, because Jduge Curtis' recusal was analogous to the death of a judge in the middle of the trial.

The chief judge granted the mistrial, and later granted defendant's motion to dismiss, holding that retrial was barred by the Double Jeopardy Clause:

> As in Little,[29] the defendant emphatically objected to the declaration of a mistrial when the trial court failed to make explicit findings as to manifest necessity. Although the trial court found an appearance of impropriety, manifest necessity to justify a mistrial has not been demonstrated. The trial judge clearly indicated that she would be able to remain impartial.[30]

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In each of these cases, the record establishes that Judge Curtis did not formally declare a mistrial. She merely recused herself.

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29 People v Little, n 25 supra.

30 This is a somewhat inaccurate characterization of the record. Defendant strenuously objected to Judge Curtis' recusal, not her declaration of a mistrial, because Judge Curtis never declared a mistrial.

In each case, the defendant contends that Judge Curtis action in recusing herself was functionally equivalent to declaring a mistrial. Acceptance of this interpretation would render the failure to formally declare a mistrial virtually meaningless; the applicable analysis would be similar to that employed had Judge Curtis actually declared the mistrial.

In contrast, the prosecutors in both cases urge us to treat Judge Curtis' midtrial recusal and refusal to further participate as an illness or other disability sustained in the middle of the trial. This midtrial disability sustained in the middle of the trial. This midtrial disability constituted manifest necessity justifying the mistrial. Put another way, the recusal in the middle of trial caused the mistrial; it was not the mistrial itself.

We find the prosecutors' arguments more

persuasive on this issue. A mistrial is defined as a "[t]rial which has been terminated prior to its normal conclusion."[31] Although Judge Boyle ultimately concluded in Hicks that Judge Curtis' actions were the functional equivalent of a mistrial, he reached this conclusion only after defendant Hicks had rejected the proffered alternatives to aborting the trial:

> Unless the defendant consented to go forward in front of another judge with the same continued proceeding, either using the transcript, as I've already made perfectly clear on the record, if the defendant opted for that, I'd do that even over the prosecution's objection and I would do that because I think I the defendant does have a right to that alternative.
>
> But the defendant doesn't wish to do that and I don't think the defendant can be forced to do that.

Judge Boyle's exploration of alternatives supports our conclusion that Judge Curtis' actions should not be equated

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31 Black's Law Dictionary (6th ed), p 1002.

with a mistrial.[32] While the options were admittedly limited, the trial should not have been terminated until such options had been considered. Stated another way, Judge Curtis' recusal operated neither as an automatic termination of the proceedings nor a necessary foreclosure of the continuation of such proceedings before another judge. On this basis, we cannot conclude that Judge Curtis' recusal, without more necessarily terminated the trial before its natural conclusion.

Consequently, we adopt the argument advanced by the prosecutors, and treat Judge Curtis' midtrial recusal and refusal to further participate as a "disability" incurred by the factfinder during the trial.

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[32] The chief judge's failure to articulate available options in Bellew does not mandate the conclusion that Judge Curtis' recusal was the functional equivalent of a mistrial. Rather the failure to consider alternatives is relevant to the question whether the ultimately declared mistrial was justified by manifest necessity.

Support for this characterization can be found in the decision of the United States Court of Appeals for the Fourth Circuit in United States v Sartori, 730 F2d 973, 976 (CA 4, 1984),[33] that a trial judge's midtrial recusal was encompassed within the term "other Disability" contained in Rule 25a of the Federal Rules of Criminal

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33 In Sartori, the defendant was a medical doctor who practiced "holistic" medicine. Two of defendant's deceased patients were cancer patients, and the trial judge was an active member of the American Cancer Society. After defense counsel informed the judge that it would not agree to a substitution of judges for sentencing purposes were the defendant to be convicted, the government suggested that judges be substituted under Rule 25(a), which permits substitution when the trial judge is unable to proceed because of any other disability.

The trial judge rejected this proposal on the basis of Fourth Circuit decision that he erroneously read as condemning this practice, and then declared a mistrial over the defendant's objection on the ground that the ends of public justice would be defeated by continuing the trial.

The Fourth Circuit held that a midtrial recusal constitutes an "other disability" under Rule 25(a). Substitution of trial judges was thus permitted under Rule 25(a).

Procedure.[34] While the dispositive issue in Sartori was the trial court's failure to consider reasonable alternatives to a mistrial, alternatives existed once the court recognized that a midtrial recusal was analogous to a disability.[35]

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33 Cont.
Despite its determination that a midtrial recusal was an "other disability" for purposes of Rule 25a, the Fourth Circuit concluded that the trial judge's failure to consider this option precluded a conclusion that manifest necessity existed to justify retrial.

34 Rule 25a of the Federal Rules of Criminal Procedure provides.

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

35 Although Sartori is distinguishable in that it involved a federal jury trial, this difference does not undermine the conclusion that a recusal in a bench trial can be deemed a disability. Rather, this distinction is relevant only in determining whether substitution of judges was permissible. More specifically, while substitution of judges was deemed permissible in Sartori, it would have

We believe Judge Curtis' refusal to further participate presented a situation not unlike that created by the midtrial disability of a trial judge. We are cognizant of the general rule, reiterated in Sartori, that trial judges must consider reasonable alternatives before declaring a mistrial. We note, however, that in contrast to the district judge in Sartori, Judge Curtis never reached the moment when reasonable alternatives were to be explored. For purposes of this trial, she became "disabled" when she recused herself, yet at this point, she had not declared a mistrial. We conclude, therefore, that our focus cannot rest solely upon Judge Curtis; rather, it must extend to the situations presented to and the actions of the

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34 Cont.
been precluded in Hicks absent consent by both the defendant and the prosecutor. See MCR 6.440(B), which states:

successor judges.[36]

3

a. People v Hicks

Recognizing the paucity of options available, Judge Boyle offered to preside over the completion of defendant's trial, or to declare a mistrial. Defendant justifiably withheld his consent to the former, and declined to request the latter.

While the former option was designed to

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[35] Cont.

During Bench Trial. If a judge becomes disabled during a trial without a jury, another judge may be substituted for the disabled judge, but only if

(1) both parties consent in writing to the substitution, and

(2) the judge certifies having become familiar with the record of the trial, including the testimony previously given.

[36] While Sartori enables us to analogize a recusal in the middle of trial to a disability, it does not allow us to dispense with the consideration of alternatives. Judge Curtis' recusal without declaring a mistrial merely allows us to focus on her successor judge in determining whether reasonable alternatives to a mistrial were considered.

protect defendant's interest in terminating the proceedings, once begun, it could not restore his "valued right to have his trial completed by a particular tribunal," lost upon Judge Curtis' recusal. Wade, supra, at 689. Once defendant rejected the "lesser included" protection of finality, Judge Boyle had no choice but to declare a mistrial. Under these circumstances, we conclude in accordance with Perez that retrial will not contravene the protections afforded by the Double Jeopardy Clause.[37]

b. People v Bellew

In contrast to Judge Boyle's performance in Hicks, the chief judge in Bellew did not engage in a "scrupulous exercise of discretion." Although his actions in reserving a decision on whether a mistrial should be granted were laudable, his failure to consider alternatives precludes a determination that manifest

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[37] It is illuminating to view the proceedings through the "jaundiced eyes of a general public," whose distrust of public

necessity justified his declaration of a mistrial in Bellew, unless it can be concluded that no reasonable alternative existed.

While it is arguable that no reasonable alternative existed, and it is perhaps probable that defendant Bellew would have refused any alternative offered, such

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37 Cont.
officials and dislike for "legal technicalities" that are the cornerstone of our constitutional liberties cannot be disputed. As aptly characterized by the dissent in the Court of Appeals:

> This case runs the danger of looking to the public as follows: The judge has a close relationship with a brother of the defendant. She says nothing about that, perhaps hoping that no one will find out. The prosecutor reminds her of this relationship, therefore telling her that the cat is out of the bag. It now is apparent that there will be problems because of the known relationship between the judge and the defendant's family. The prosecution does not move for a mistrial, to disqualify the judge, or for anything else. The judge refused to participate further and, if the double jeopardy claim is upheld the defendant gets off absolutely free from a life offense (and from a charge of

speculation cannot support a conclusion that manifest necessity existed. At a minimum, the chief judge should have expressly raised the possibility of completing the trial before a different judge. Even after losing his "particular tribunal," defendant may have opted to exercise his "lesser included"

> Hold it, Your remedy is in the Court of Appeals, not here, because I have no authority to rule on her motion to disqualify herself once she grants it.

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37 Cont.

> possession of a firearm during the commission of a felony) because the trial judge, by some legal mumbo jumbo, made it forever impossible for the prosecution to continue the case against the defendant to judgment and sentence. If that doesn't evoke the "appearance of impropriety," I do not know what does. [201 Mich App 208 (J.T. Hammond, J., dissenting).]

Like the dissent in the Court of Appeals, we neither suggest nor believe that this is or even might be true. Undoubtedly, there will be some who will believe Judge Curtis might have conspired to obstruct justice. She alone can deny this. Our paramount concern however, is the shadow cast on the integrity of the entire judiciary in this state.

interest in finality, and chosen to continue the trial before another factfinder, preserving any recorded testimony that he perceived to be favorable.[38]

The chief judge did allude to the possibility of appealing Judge Curtis' recusal:We are not suggesting an appeal should have been taken; we are merely noting another option that the chief judge failed to adequately explore.

We will not attempt to discern whether defendant would have accepted any of these options. It is sufficient for our purposes that options existed that remained unexplored. People v Benton 402 Mich 47; 260

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38 See Lafave & Israel, n 23 supra, p 1057 ("if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weakness of its own"); see also People v Benton, 402 Mich 47, 62; 260 NW2d 77 (1977) (mistrial "relieved the prosecutor of the embarrassment of having his own witness exculpate the defendant").

NW2d 77 (1977).[39]

Moreover, we note that allowing a retrial of defendant Bellew would subject him to a third trial on the charge of receiving and concealing stolen property in excess of $100. Finding this to be a close case, and being cognizant of the command to resolve doubts in favor of the defendant, Downum, supra, we decline to hold that manifest necessity existed to justify the mistrial in Bellew.[40]

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[39] See United States v Cameron, 953 F2d 240, 243 (CA 6, 1992) ("While the Constitution does not require a trial judge to conduct a hearing on the record, the record must support the finding that manifest necessity justified the declaration of a mistrial." (Citations omitted.)

[40] Moreover, we note that the prosecutor moved for Judge Curtis' disqualification in Bellew, and consequently must bear some responsibility for her decision to recuse herself in the middle of trial.

IV

Accordingly, we conclude that Judge Curtis' recusal and refusal to continue in both Hicks and Bellew is analogous to a midtrial disability suffered by the presiding judge, and that the determination whether manifest necessity existed to justify a mistrial necessarily depends on whether a "scrupulous exercise of discretion" by the successor judge would have revealed reasonable alternatives to declaring a mistrial. We conclude that only Judge Boyle properly considered available alternatives to declaring a mistrial, and that in Hicks, the defendant's justified refusal of the proffered alternatives constituted manifest necessity for the mistrial. Consequently, defendant Hicks may be retried consistent with the protections afforded by the Double Jeopardy Clause, but retrial of defendant Bellew is barred by the Double Jeopardy Clause.

Accordingly, we would reverse the decision of the Court of Appeals in Hicks and would remand for retrial, and we would affirm the decision of the Court of Appeals in Bellew.

James H. Brickley

Robert P. Griffin

Conrad L. Mallett, Jr.

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 97552

TYRONE HICKS,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 98753

RODNEY BELLEW,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

CAVANAGH, C.J. (concurring in part and dissenting in part).

In each of these consolidated cases, the trial judge recused herself midtrial, stating that an appearance of impropriety on part may have existed. In People v Hicks, the successor judge gave the defendant three options; in People v Bellew, the successor

judge did not. The successor judges both declared mistrials. The Court of Appeals held that retrials were barred by double jeopardy.[1]

In its analysis, the lead opinion focuses on one distinction between the two cases: whether the successor judge gave the defendant options before declaring a mistrial. The lead opinion does not address the threshold issue whether the trial judge's recusal was proper.

Even though the lead opinion reaches the proper result in Bellew, I must respectfully dissent in both the instant cases.

I. THE CONSTITUTIONAL STANDARD

A. Double Jeopardy

In People v Dawson, 431 Mich 234, 427 NW2d 886 (1988), this Court examined the

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[1] People v Hicks, 201 Mich App 197; 506 NW2d 269 (1993); People v Bellew, unpublished per curiam opinion of the Court of Appeals, issued January 7, 1994 (Docket No. 157434).

Double Jeopardy Clauses found in the Michigan and federal constitutions. We noted that "[t]he purpose of the double jeopardy prohibition is to limit the state to having generally only one attempt at obtaining a conviction." Id. at 250. We further explained:

> The Double Jeopardy Clause does not bar all retrials. . . . The [United States Supreme] Court has fashioned a balancing test focusing on the cause prompting the mistrial. The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control. Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed in declaration of the mistrial was "manifest[ly] necess[ary]" . . . . [Id. at 252 (emphasis added).]

We reiterated this balancing test:

> "[D]efendant's interest in finality . . .[and] in having his guilt or innocence decided in one proceeding . . . must be balanced against society's interest in affording the prosecutor one full and fair opportunity to present his evidence to the jury." [Id. at 252, n 44, quoting Oregon v Kennedy, 456 US 667, 682; 102 S Ct 2083; 72 L ed 2d 416 (1982) (Stevens, J., concurring).]

B. Manifest Necessity

In Dawson, we restated the manifest necessity concept:

> "[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." [Dawson at 252, quoting United States v Perez, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).]

Further, "[w]here a reviewing court holds that the mistrial was not manifestly necessary, the double jeopardy prohibition bars retrial." Id. at 252-253, n 47 (citation omitted).

In United States v Jorn, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971) (plurality), Justice Harlan stated that if the defendant does not consent to the motion for mistrial, "The Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice

would not be served by a continuation of the proceedings." (Citation omitted.) Justice Harlan emphasized the defendant's interest:

> Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. [Id. at 486.]

In People v Benton, 402 Mich 47, 57, 61; 260 NW2d 77 (1977), a plurality of this Court embraced Jorn's direction to the trial judge to explore "viable alternative curative measures before sua sponte declaring a mistrial." Moreover, "[b]efore a trial judge sua sponte declares a mistrial he or she should make explicit findings, after a hearing on the record, that no reasonable alternative exists."

II. THE CASES AT BAR

The lead opinion properly focuses its inquiry on whether manifest necessity

justified each mistrial. [2] It relies on direction from Jorn:

> [T]he determination whether manifest necessity existed to justify a mistrial necessarily depends on whether a "scrupulous exercise of discretion" by the successor judge would have revealed reasonable alternatives to declaring a mistrial. [Opinion of Griffin, J., at 29.]

I agree with the lead opinion's analysis of the constitutional considerations up to this point. However, I would add an additional inquiry that we stated in Dawson: whether the cause prompting the mistrial was outside the prosecutor's and the trial judge's control. Id. at 252.

In each of the cases at bar, I would hold that the cause prompting mistrial was within the control of the prosecutor or the trial judge. Therefore, neither mistrial was compelled by manifest necessity.

In each case, the lead opinion sidesteps the issue whether the trial

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[2] Neither defendant consented to waive his right to avoid double jeopardy.

judge's recusal, on the basis of the appearance of impropriety, was justified.[3] Instead, the lead opinion equates the trial judge's recusal to a disability and examines the successor judge's actions. By focusing on the "clean-up" part of the case histories, the lead opinion would create an arbitrary, bright-line: A judge can disqualify himself from a case for any reason, and as long as the successor judge recites a litany of options, whether or not they are meaningful options,[4] manifest necessity is established and retrial can proceed.

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[3] The court rule provides:

> A judge is disqualified when the judge cannot impartially hear a case. . . . [MCR 2.003)B).]

If a judge can impartially hear a case, a judge may not properly recuse herself over the objection of a party merely because there may be an appearance of impropriety, especially in a bench trial after the first witness has been sworn and the defendant is deemed to be "in jeopardy" for purposes of the Double Jeopardy Clause.

[4] in Hicks the successor judge offered three options that were each detrimental to the defendant. Opinion of Griffin, J., at

Unfortunately, as Justice Harlan indicated,[5] manifest necessity cases are much more complex and should be decided by the constitutional balancing test. Accordingly, I believe that the sounder approach is to focus on the real cause of each trial's termination: the trial judge's recusal without apparent justification. I would then determine whether manifest necessity existed, "whether a 'scrupulous exercise of discretion' by the successor judge would have revealed reasonable alternatives to declaring a mistrial,"

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17. For instance, recalling witnesses would deprive the defendant of any points made on the first cross-examination; at re-examination, the witnesses would be anticipating the defense counsel's strategy., Further, simply substituting judges in a bench trial would deprive the defendant of having his trier-of-fact hear first-hand the testimony of the witnesses on cross-examination. Finally, the option of declaring a mistrial would deprive the defendant of his preferred choice of having the first trial judge decide his fate.

5 Jorn at 485. The discretionary decision to grant or deny a mistrial cannot be resolved by "rules based on categories of circumstances. . . ."

Griffin, slip op at 26, and whether the cause of the mistrial was outside the control of the prosecutor and the trial judge. I turn now to the individual cases.

III. PEOPLE V HICKS

In Hicks, neither party moved from recusal. The trial judge, sua sponte, recused herself and transferred the case to the chief judge, who in turn assigned the case to a successor judge. When the trial judge recused herself, the prosecutor could have filed an interlocutory appeal for a determination whether the appearance of impropriety was sufficient to justify recusal and, in turn, whether manifest necessity was established, compelling a mistrial. The prosecutor did not do so. If the appellate court had ruled that the trial judge should proceed with the trial, the trial court have continued to its conclusion.[6] A mistrial would then have

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[6] In Hicks at 202, the Court of Appeals majority found that the mere appearance of

been avoided.[7] Therefore, the cause of the mistrial was within the prosecutor's control.

I would hold that Defendant Hicks' right to have his fate decided in one proceeding by the sitting trial judge outweighed society's interest in prosecuting him where the prosecutor did not pursue an interlocutory appeal of the trial judge's recusal in order to preserve the prosecutor's claim that manifest necessity compelled the mistrial.

IV. PEOPLE V BELLEW

In Bellew, the prosecutor moved for recusal. The trial judge granted this motion over the defendant's objection and

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6 Cont.
impropriety did not establish manifest necessity.

7 On the other hand, if the appellate court had ruled that the trial judge should not proceed, then a mistrial would have been proper, and it would have been compelled by manifest necessity.

recused herself. [8] Even though the trial judge did not declare a mistrial, the cause of the mistrial was within her control: she could have referred the case to the chief judge for a hearing on whether she could proceed. [9] If the chief judge then ruled that she could proceed, the trial could have proceeded to its conclusion. [10] A mistrial would then have been avoided. [11]

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[8] Cont'd
I reject Justice Boyle's contention that defendant Bellew waived his right to avoid double jeopardy. The defendant combined his motion for mistrial with a motion to dismiss on double jeopardy grounds. Further, he had vigorously objected to the trial judge's recusal. Even the prosecutor in the instant case expressly declined to rely on consent. Therefore, I believe that the defendant's motion for mistrial was not a waiver of his constitutional protection against double jeopardy.

[9] In fact, the defendant requested an evidentiary hearing, which the judge refused to conduct.

[10] The prosecutor could then have chosen to file an interlocutory appeal.

[11] If the chief judge ruled that she could not proceed, then, subject to appeal, a mistrial would have been proper and compelled by manifest necessity.

I would hold that Defendant Bellew's right to have his fate decided in one proceeding by the sitting trial judge outweighed society's interest in prosecuting him where the trial court granted the prosecutor's motion to disqualify herself, over the defendant's objection, without first determining that recusal was necessary.

V. CONCLUSION

I would find that a reasonable alternative to mistrial existed, i.e., a hearing on whether recusal was required, and that the cause of the mistrial was not outside the control of the prosecutor in Hicks and the trial judge in Bellew. Therefore, in both of the instant cases, I would affirm the Court of Appeals holding that retrial was barred by double jeopardy.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 97552

TYRONE HICKS,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 98753

RODNEY BELLEW,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

RILEY, J. (concurring in part and dissenting in part).

I sign Justice Boyle's dissenting opinion in People v Bellew. I write separately to express my agreement with the result of the lead opinion in People v Hicks. On these facts, defendant Hicks did not consent to a mistrial. Because there existed a manifest necessity to declare a mistrial, retrial of Hicks does not violate the Double Jeopardy Clause.

STATE OF MICHIGAN

MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 97552

TYRONE HICKS,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 98753

RODNEY BELLEW,

Defendant-Appellee.

BOYLE, J. (dissenting in Bellew).

Defendant Rodney Bellew was initially charged with four counts of receiving and concealing stolen property over the value of $100, four counts of altering a vehicle identification number (VIN) with the intent to mislead regarding identity, and owning or operating a chop shop. Before trial, the prosecutor dismissed three of the four receiving and concealing stolen property

counts and the chop shop count because of an inability to produce material witnesses. At the conclusion of a waiver trial before the Honorable Daphne Means Curtis, the defendant was found guilty of receiving and concealing stolen property over $100 and of the four counts of altering a VIN with the intent to mislead another regarding the identity of the motor vehicle.

Before sentencing, the defendant dismissed his attorney and retained attorney Walter Pookrum, who filed a motion for a new trial on the basis of ineffective assistance of counsel. Several hearings were held between November 21, 1991, and February 24, 1992. On February 24, 1992, Judge Curtis found prior counsel ineffective in respect to the receiving and concealing of stolen property count, and granted defendant's motion for a new trial on that basis.

Defendant waived a trial by jury, and a bench trial before Judge Curtis began on

June 9, 1992, but was not finished because of the court's docket. The trial was adjourned until June 23, 1992 upon agreement of the parties.

On June 16, 1992, the prosecutor learned about what seemed to be a business arrangement between new defense counsel and Paul Daniel Curtis, the trial judge's husband. Although the exact details of the arrangement were not known by the prosecutor, business cards indicated that the two individuals shared a common office, a common fax number, and the same receptionist. The prosecutor represented in his written motion that a call to Mr. Pookrum at Mr. Curtis's office yielded the response that Mr. Pookrum was not presently in but that they would have him return the call.

A motion to disqualify was brought before Judge Curtis on June 23, 1992. Without granting a mistrial, Judge Curtis

recused herself "[t]o insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured..."

The litigants then appeared before Judge Dalton Roberson, who almost immediately suggested that the propriety of Judge Curtis' recusation was a matter for the Court of Appeals, not himself. The prosecutor then argued that the case should continue with another judge. The court responded by stating twice that he did not think it was permissible to switch triers of fact in the middle of a trial, and that a mistrial had to be declared. Each time, defense counsel agreed. The court scheduled a subsequent hearing to allow the prosecutor to submit authority on the issue of changing triers of fact in a bench trial.

At the hearing, the prosecutor began by stating, "I questioned whether you had to grant a mistrial. At that point, your Honor, I looked into it. The defense said

you had to grant a mistrial. I agree, your Honor, I think you should grant a mistrial and assign it for trial." With defense counsel stating, "I don't think you have any choice about that," Judge Roberson formally declared a mistrial. The discussion turned to whether a second trial would violate the Double Jeopardy Clause.

On September 25, 1992, Judge Roberson issued an opinion holding that retrial would be barred on double jeopardy grounds. The prosecutor appealed, and the Court of Appeals affirmed.

II.

At the point that Judge Curtis recused herself, the defense counsel had two choices, each of which he clearly understood. He could have continued the trial before a different judge who had read the transcripts, as the prosecutor initially suggested, and preserved his objections to

recusal for appeal in the event of conviction. Alternatively, defense counsel could have opted to abandon the trial and begin anew. Counsel objected to reassignment, insisted on a mistrial, and the mistrial was declared at this request.

The defendant now attempts to fashion a third option, one that is the moral equivalent of eating his cake and having it too. The defendant, who asked for the mistrial, now claims that the state is barred from further prosecution because the mistrial was not necessary. The lead opinion agrees and holds the following:

> 1. The defendant's request for a mistrial did not lift the bar to double jeopardy because he did not have the option of completing the trial before the judge who began it.
>
> 2. Therefore, retrial is barred unless the prosecutor shows manifest necessity for the mistrial.
>
> 3. The retrial was not manifestly necessary because the judge did not "explore: the defendant's choices before granting his request.

Because I disagree with each of these propositions, I respectfully dissent. I would hold:

1. The Defendant's request for the mistrial lifted the bar to double jeopardy because the defendant's request was not intentionally provoked by the prosecution.

Because the mistrial was declared at the defendant's request, the state does not need to justify the declaration. The "manifest necessity" strand of double jeopardy precedent applies where a mistrial is granted over the defendant's objection.

3. Even if this case were properly analyzed under the line of cases involving sua sponte declarations of mistrial, or mistrial over the defendant's objection, thus requiring the prosecution to show manifest necessity, it has met this requirement. Judge Roberson's decision to grant a mistrial was necessary in the strictest sense of the word. Because counsel resisted any alternative, he had no other choice.

4. The lead opinion's requirement that the judge must "explore" alternatives available to the defendant may be appropriate where the cause of the mistrial is subject to manipulation by the prosecutor, and the defendant asserts feasible alternatives to a mistrial. Where the trial has begun and the cause of the mistrial is not one

that the prosecutor has manipulated to avoid an acquittal, the defendant's interest in completing the proceedings is subordinate to the public interest in affording the prosecution one full and fair opportunity to present the evidence to an impartial factfinder.

5. Where the situation triggering mistrial is potential bias of the factfinder, the trial court's exercise of discretion in declaring a mistrial is entitled to the highest deference.

III.

The result in People v Bellew is governed by application of a very straightforward rule: "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." United States v Dinitz, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976); see also Oregon v Kennedy, 456 US 667, 672-673; 102 S Ct 2083; 72 L Ed 2d 416 (1982). After a trial is aborted on the defendant's own motion, a second trial is barred only "where the

governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial..." Id. at 676. There is not the slightest suggestion of such intent here, nor would the record support it. Therefore, the defendant's request for a mistrial waives the bar to double jeopardy, and he may be retried.

A.

The lead opinion initially errs by analyzing both Hicks and Bellew under the manifest-necessity standard for declarations of mistrial over the defendant's objection. However, as the facts clearly indicate, there is a critical distinction between the cases. The defendant in Hicks did not move for a mistrial but resisted any alternative to Judge Curtis' declaration of disqualification. The record in Hicks thus arguably presents the issue whether "manifest

necessity" justified the mistrial.[1] However, this test applies only "[w]here the trial is terminated over the objection of the defendant..." "Oregon v Kennedy, supra, 456 US 672 ("in the case of a mistrial declared at the behest of the defendant, quite different principles come into play").

The lead opinion states that it "cannot conclude that [the] defendant [Bellew] consented to the mistrial," because he objected to Judge Curtis' decision to recuse herself and expressed a desire to conclude the trial before her. Slip op at 11. The approach thus confuses defendant's objection to Judge Curtis' action with the remedy he sought in light of it.[2] It is necessary to support the proposition that, because

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[1] I am not participating in Hicks, but I believe that defendant's refusal to consent to any alternative was the "functional equivalent" of a request for a mistrial.

[2] Slip op p 12, n 19.

the defendant's ideal choice - continuing the trial before the judge whose husband he apparently shared an office with - was no longer available, his request for a mistrial did not amount to consent. However, the analysis fails to acknowledge that this method of analyzing a defendant's request for mistrial has been rejected by the United States Supreme Court. The relevant inquiry for present purposes is not why counsel believed that a mistrial should be declared, but whether he opted for that alternative instead of choosing to continue the trial. As the lead opinion acknowledges, defendant sought "a declaration of a mistrial."

In United States v Dinitz, supra, the Supreme Court emphasized that only a request is necessary to lift the bar to double

jeopardy.[3] The trial court excluded Dinitz's lead attorney from his trial and then declared that if the defendant did not appeal that order, he would have to choose between continuing the trial the next day with co-counsel and a mistrial. Because he felt he needed more time to obtain outside counsel, the defendant elected a mistrial. 424 US 604. He was tried again and convicted on both counts.

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed the convictions for reasons strikingly similar to those employed here to support the conclusion that counsel for defendant Bellew did not consent. See

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[3] See, e.g., Dinitz, 424 US 607 ("a motion by the defendant for a mistrial"), id. at 608 ("mistrials granted at the defendant's request or with his consent"). The Supreme Court appears to use "consent" in a very different manner than the lead opinion: to refer to mistrials not requested by the defendant, but only acquiesced to.

Griffin, J. slip op at 11-14. The Court of Appeals in Dinitz reasoned that the trial court's exclusion of counsel had left respondent no choice but to ask for a mistrial and therefore the "request for a mistrial should be ignored and the case treated as though the trial judge had declared a mistrial over the objection of the defendant." 424 US 605. The court held that "'something more substantial than Hobson's choice' is required before a defendant can 'be said to have relinquished voluntarily his right to proceed before the first jury.'" 424 US 608 (quoting United States v Dinitz, 492 F2d 53, 59).

The Supreme Court granted certiorari and reversed, specifically quoting and rejecting the position that the lead opinion here adopts: that the request for mistrial should be ignored. The Court emphasized that:

> traditional waiver concepts have little relevance where the defendant must determine whether or not to request or

> consent to a mistrial in response to judicial or prosecutorial error .... In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudical judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error. [424 US 609.]

Double jeopardy rights, unlike the right to counsel, for example, do not require a knowing, intelligent waiver. When a defendant seeks the mistrial, "the central policy of the Double Jeopardy Clause - to protect defendant's from government-instigated multiple prosecutions and sentences is not implicated." United States v Jamison, 164 US App DC 300, 305; 505 F2d 407 (1974), cited with approval in Dinitz, 424 US 609 (emphasis in original). The Jamison court summarized its lengthy explanation [4] of why mistrial motions

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[4] In part, the court stated the following:

> To treat mistrial motions as waivers of double jeopardy protection would be

cannot be treated as waivers of rights, which would require the defendant's personal approval and full advice of rights, with this concise statement:

> The startling implication of barring reprosecution after a mistrial brought about by defense counsel's own errors and on his own motion is that the government could irrevocably lose the right to prosecute for a given crime without itself having committed the least impropriety, and with the trial judge having erred only in declining to second guess defense counsel as to the accused's best interest. [Id. at 306]

Confirming that "traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial" the court further explained in Dinitz, 424 US 609:

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4 Cont'd

> to require among other things that it be established that the defendant himself concurred in such motions, fully comprehending all his alternatives ... Defendant would thus be protected from multiple prosecutions brought about not by the government but by the errors or misjudgments of his own counsel. We think this goes too far. [Id. at 413.]

> The respondent characterizes a defendant's mistrial motion as a waiver of "his right not to be placed twice in jeopardy" and argues that to be valid the waiver must meet the knowing, intelligent, and voluntary standard set forth in Johnson v Zerbst, 304 US 458 [58 S Ct 1019; 82 L Ed 1461 (1938)]. This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognized that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See Breed v Jones, 421 US 519, 534 [95 S Ct 1779; 44 L Ed 2d 232 (1975)]; United States v Wilson, 420 US 332, 343-344, n [95 S Ct 1013; 43 L Ed 2d 232 (1975)] (plurality opinion); United States v Jorn, 400 US 470, 484-485, n 11 [91 S Ct 547; 27 L Ed 2d 543 (1971)] (plurality opinion); United States v Tateo, 377 US [463, 466; 84 S Ct 1587; 12 L Ed 2d 448 (1964)]. [Id. at 609-610, n 11.]

Viewed in this light, the case is on all fours with Dinitz. Bellew faced the same alternatives:

> (1) continuing with the trial in spite of the judge's decision; or

(2) a declaration of a mistrial. [Compare 424 US 609.]

Like Dinitz, Bellew selected a mistrial. Thus Dinitz is controlling not only in its rationale, but in its holding.

The lead opinion appears to limit Dinitz to cases in which the defendant can complete his trial with the same factfinder: "Unlike other trial errors, a judge's decision sua sponte to recuse herself after jeopardy has attached in a bench trial deprives a defendant of the option to obtain a verdict from the first factfinder." Slip op at 13, n. 22. While the statement is true, it is constitutionally irrelevant. Like all errors that result in a mistrial, the declaration of a mistrial deprives a defendant of the right to obtain a verdict from the first factfinder.

The issue is not whether the incident precipitating a declaration of mistrial was error or not. The Double Jeopardy Clause protects the defendant's right to choose to

proceed with the trial and preserve the error for appeal if he is not acquitted, or to abort the trial and begin again. If defendant decides to abort the trial, his interests have been protected because he has made the choice.

The availability of an alternative to a mistrial-continuing the trial with another judge - was controlled by the defendant. Because he chose not to exercise it, the retrial he requested was not only manifestly necessary, but absolutely necessary.

B.

The attempt to distinguish Dinitz on the basis that Bellew was "deprive[d] ... of the option to obtain a verdict from the first factfinder" is based on erroneous assumptions. First, the Supreme Court has held that the option to obtain a verdict in the first trial is not essential to the permissibility of retrial. In United States v Tateo, 377 US 466-467, the defendant pleaded guilty during his first trial because of improper threats by the judge. He subsequently withdrew his plea, received

a trial, and was convicted. The Supreme Court held that the defendant's double jeopardy rights had not been violated even though he was involuntarily deprived of the choice to take his case to the first jury:

> Tateo contends that his situation must be distinguished from one in which an accused has been found guilty by a jury, since his involuntary plea of guilty deprived him of the opportunity to obtain a jury verdict of acquittal. We find this argument unconvincing. IF a case is reversed because of a coerced confession improperly admitted, a deficiency in the indictment, or an improper instruction, it is presumed that the accused did not have his case fairly put to the jury. A defendant is no less wronged by a jury finding of guilty after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial. [377 US 466-467 (emphasis added).]

Second, assuming that Judge Curtis' decision to recuse herself was erroneous, Bellew in fact had the option to complete the trial and challenge the recusal as error requiring reversal. The prosecutor suggested continuation, but the defendant insisted on a mistrial. The statement that

defendant Bellew did not waive these alternatives is thus both factually and legally incorrect.

IV.

The foregoing indulges the assumptions that the principle right protected by double jeopardy is the right to have the trial completed before a particular tribunal, that the interest in finality is a "lesser included" protection, and that the right to a particular tribunal applies in a bench trial. These positions are premised on the language in Dinitz about "taking [the defendant's] case 'to the first jury,'" quoting United States v Jorn, 400 US 470, 484; 91 S Ct 547; 27 L Ed 2d 543 (1971). Slip op at 12, quoting Dinitz, 424 US 608. Applying this language to a bench trial takes it out of context. Losing the trier of fact in a jury trial means that the trial cannot continue. In a bench trial, on the other hand, a second judge may continue the

trial from the point of interruption by reading the transcripts. See MCR 6.440(B).[5]

The question is whether concluding a bench trial with a different judge constitutes double jeopardy. It appears that a defendant's valued right to a particular tribunal is merely an incident of the defendant's more generalized interest in being able to complete the trial itself. Professors Westen and Drubel's explanation of this position and examination of the relevant cases merits lengthy mention:

> Before an analysis of this interest in finality, however, it may be useful to turn

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5 This is not to say that judges are interchangeable for the purposes of bench trials. Certainly one reason the court rule requires the parties' consent before changing judges is that the initial decision to waive a jury trial would depend to some degree on the identity of the judge. This consideration may have prompted Judge Boyle's offer to defendant Hicks of the additional alternative of a jury trial before him.

to value (4), i.e., the defendant's "valued right to have his trial completed by a particular tribunal." Although the Court has never explored the nature of this valued right, there are several possible interpretations. One is that a defendant has a constitutional interest in having his case resolved by a tribunal that he perceives to be "favorably disposed to his fate."[6] This suggestion finds no support in the Court's decisions. Assume, for example, that a case, having been assigned to a judge whom the defendant considers favorable, is reassigned to another judge before the trial commences. Or assume that a juror whom the defendant perceives to be favorable is excused and replaced by an alternate juror for no compelling reason. Whatever else may be objectionable about such changes, they can hardly be said to violate double jeopardy. Accordingly, "the [defendant's] interest in having his 'trial completed by a particular tribunal' must refer to some interest other that retaining a fact-finder thought to be favorably disposed toward the defendant."

Another meaning is more likely. A defendant has a valued right to have his trial completed by a particular tribunal, not because he has a constitutional interest in the identity of any particular tribunal, but because he has an interest in being able "to conclude his confrontation with society"

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6 Jorn, supra, 400 US 486. The lead opinion quotes Jorn in attempt to document its assertion that the argument by Professors Westen Drubel "conflicts with language ... in Jorn." The above-referenced quotation, however, is from Jorn, which was a plurality opinion. Moreover, as subsequent authority confirms, defendant does not have a right to object to a

once it has begun. Once a trial begins, a defendant has a legitimate interest in getting the trial over with "once and for all." It follows, therefore, that he also has an interest in continuing with "the first jury" impaneled in the case because changing the jury means interrupting the trial. To that extent, the defendant's interest in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. [Westen & Drubel, Toward a general theory of double jeopardy, 1978 S Ct R 81, 89-90.]

Contrary to the assumption of the lead opinion, in cases since Jorn, the Court has identified the primary interest protected as being able once and for all to conclude confrontation with the state. It is this interest, rather that the value of proceeding with the first tribunal, that is balanced against the public interest in one full and fair opportunity for presentation of the prosecutor's evidence. See,

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6 Cont.

mistrial and claim jeopardy preclusion unless the cause of the mistrial is one that could be manipulated to abort a proceeding that is not going favorably to the prosecution. See Arizona v Washington, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978).

generally, Illinois v Sommerville, 410 US 458; 93 S Ct 1066; 35 L Ed 2d 425 (1973); Arizona v Washington, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978).

Had the defendant objected to the mistrial and agreed to have the case transferred to another judge, and the prosecutor objected to the transfer, or any other alternative, see n4 above, thereby causing a mistrial to be declared over the defendant's objection, it might be more persuasively argued that defendant's interest in final confrontation had been violated. However, Bellew's interest in finality could have been served by transferring the case to a different judge. Defendant rejected that alternative, chose to abort the proceedings, and thus waived the opportunity to try the case to conclusion.

V

Ignoring the defendant's request for mistrial, the lead opinion applies the

manifest-necessity strand of jeopardy jurisprudence and states that the permissibility of a retrial is governed by the "rule... that trial judges must consider reasonable alternatives before declaring a mistrial." Slip op at 23. The opinion construes this rule, which actually concerns the availability of alternatives to a mistrial over the defendant's objection, as a rule about the "exploration" of possibilities. On this basis, it concludes that retrial is barred, not because there were alternatives to a mistrial, but because the judge failed to "adequately explore" them, id. at 26:

> At a minimum, the chief judge should have expressly raised the possibility of completing the trial before a different judge. Even after losing his "particular tribunal," defendant may have opted to exercise his "lesser included" interest in finality, and chosen to continue the trial before another factfinder, preserving any recorded testimony that he perceived to be favorable. [Id. at 26.]

The lead opinion's emphasis on

"adequate exploration" is based on a misunderstanding of United States v Sartori, 730 F2d 973 (CA 4, 1984), and fails to acknowledge that the Supreme Court has, in analogous contexts, rejected the contention that a declaration of mistrial must be the least drastic available remedy to constitute "manifest necessity." In Sartori, the trial judge abruptly recused himself in the midst of a jury trial over the objection of both parties and sua sponte declared a mistrial. A different district judge ruled that the mistrial did not lift the bar to double jeopardy, and the Court of Appeals affirmed. The court held that it had not been manifestly necessary to declared a mistrial over the defendant's objection because the judge who declared the mistrial had an available alternative-assigning the case to another judge.

Sartori actually stands for the proposition that a mistrial should not be

declared because of the disability of a judge presiding over a jury trial when the defendant objects to the mistrial and it can be avoided by substituting another presiding judge. [7] The lead opinion's statement that substitution was precluded in the absence of consent ignores the fact that, unlike defendant Sartori, who objected to the mistrial, defendant Bellew requested a mistrial. Likewise, assuming arguendo that Judge Roberson had to explore alternatives, the defendant declined a different judge insisted on a mistrial.

---

[7] See FR Crim P 25 (a):

If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

The assumption that, as a matter of law, manifest necessity requires the exploration of less drastic alternatives to mistrial also ignores that the United States also ignores that the United States Supreme Court has specifically rejected the proposition that all other alternatives to a mistrial must be explored on the record in the context of mistrial triggered by the possibility of bias. In Arizona v Washington, 434 US 511, 516-517, the Court held that the record did not have to reflect the exploration and rejection of all available alternatives so as to establish the necessity for mistrial.

In Washington, the trial judge granted the prosecutor's motion for mistrial after defense counsel made improper prejudicial arguments during his opening statement. Id. at 499-501. Rejecting the argument that the mistrial was not necessary because the judge could have given cautionary instructions to

the jury, Justice Stevens explained that "the key word 'necessity' cannot be interpreted literally," but that there are degrees of necessity that vary depending on the circumstances. Id. at 506. The highest degree of necessity "is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence..." Id. at 508.

At the other end of the spectrum, however, are cases where mistrial is triggered by the possibility that the fact-finder may be prejudiced. Id. at 510. The Court observed that when the difficulty leading to mistrial is the possible bias of the factfinder, the trial court's determination is entitled to great deference from the reviewing court. Although the mistrial was not strictly and literally necessary because "some trial judges might have proceeded with the trial after giving the jury appropriate cautionary

instructions," the Court held that the bar to double jeopardy was lifted because of the "overriding interest in the evenhanded administration of justice ...." Id. at 511. The Court summarized its reasoning this way:

> Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgments" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled. [Arizona v Washington, 434 US 516.]

Washington illustrates that the focus of inquiry is not the factfinder's actual capacity to be fair to the prosecutor, but the decision to grant the defendant's request. [8] Slip op at 26. Whether Judge Curtis erred or not is not the proper focus of inquiry even under the manifest-necessity strand of double jeopardy. The inquiry is whether the mistrial was necessary. When

---

[8] Where the manifest-necessity test properly applies, only the mistrial, and not the events giving rise to it, must be necessary:

possible bias is the triggering event, the declaration of necessity is within the trial court's discretion, and "the highest degree of respect" to the declaration of mistrial is accorded on review.

Judge Curtis stated that she was recusing herself "[t]o insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured...." While

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8 Cont'd

[T]he double jeopardy clause does not require "manifest necessity" for the events that triggered the mistrial; manifest necessity for the mistrial itself will ordinarily permit a second trial. See Illinois v Sommerville, 410 US 458; 93 S Ct 1066; 35 L Ed 2d 425 (1973); Arizona v Washington, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978). If Pavlovic's perspective were correct, mistrials caused by prosecutorial or judicial errors could never be followed by second trials, because it is never manifestly necessary to make a mistake. Yet Sommerville held that a prosecutor's blunder in drafting an indictment supplied manifest necessity for a mistrial. See also Lee v United States, 432 US 23, 33-34; 97 S Ct 2141; 53 L Ed 2d 80 (1977). Often the blunder escapes

disqualification is not a step to be lightly taken, particularly when jeopardy has attached, neither Judge Curtis nor Judge Roberson was obligated justify her recusation on the basis of the appearance of impropriety by requiring her to prove that she had a financial interest that would in fact make her partial. Assuming the applicability of the manifest necessity standard, as in Washington, "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation ...." 434 US 511.

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8 Cont'd
notice until the trial is over, yet a reversal may be followed by a second trial. See Burks v United States, 437 US 1, 12-15; 98 S Ct 2141; 57 L Ed 2d 1 (1978). If the proceeding is doomed to be reversed, it may be stopped short. [United States v Buljabasic, 808 F2d 1260, 1265 (CA 7, 1987).]

V

The approach adopted by the lead opinion presents the obvious potential for unwarranted expansion of double jeopardy claims. Moreover, to the extent it is based on a perceived need to discourage unwarranted recusations, it is misguided.

The lead opinion's struggle with applicable authority to reach the explicit conclusion that defendant had a right to have Judge Curtis serve as his particular tribunal is based on the unexpressed premise that to permit a judge to recuse herself from a bench trial after jeopardy attaches would invite corruption. Yet the foreordained result of the lead opinion's conclusion that the defendant's interest in continuing with the particular factfinder is superior to his interest in finality is that the defendant must go free.

While trial judges should be wary of recusing themselves on the basis of a

cynical perception of judicial integrity, we should be equally loath to discourage recusal on the basis of a good-faith belief that the circumstances are such that any ultimate verdict would be compromised. A decision that tells trial courts that, despite such a possibility, the trial must be completed on pain of the defendant going free, discourages the honest expression of reservations. Given that the interest in finality could have been accommodated, tolerating rare instances of disqualification far better serves society that repressing judicial candor, issuing compromised decisions, or turning defendants free.

CONCLUSION

For the foregoing reasons, I would reverse the decision of the Court of Appeals and remand the case to Detroit Recorder's Court for trial.

APPENDIX B

Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: April 20, 1994

Michael F. Cavanagh
Chief Justice

98753

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

Michigan Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 98753
COA: 157434
LC: 91-5030

RODNEY BELLEW,

Defendant-Appellee.

On Order of the Court, the application for leave to appeal is considered, and it is GRANTED.

We further ORDER that this case be argued and submitted to the Court together with the case of People v Hicks (Docket NO. 97552), at such future session of the Court as both cases as ready for submission.

20316

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court

April 20, 1994 /s/ Corbin R. Davis,
Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, January 7, 1994

v No. 157434
LC No. 91-05030

RODNEY DWIGHT BELLOW,

Defendant-Appellee.

Before: Jansen, P.J., and White and K. N. ansen,* JJ.

PER CURIAM.

The prosecutor appeals as of right the trial court's dismissal, on double jeopardy grounds, of one count of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803. We affirm.

Defendant was initially charged with four felony counts of receiving and concealing stolen property in excess of $100 and four misdemeanor counts of concealing or misrepresenting the identity of a motor vehicle without into to mislead, MCL

750.415; 28.647. At trial, the prosecutor proceeded on only one felony count and all four misdemeanor counts. After a bench trial before Recorder's Court Judge Daphne Means Curtis, defendant was found guilty of all charges tried. Defendant moved for a new trial based on ineffective assistance of counsel. He was granted a new trial on the one felony count. A retrial before Judge Curtis began of June 9, 1992 and was continued to June 23.

On June 18, the prosecutor filed a motion to disqualify Judge Curtis, alleging that defense counsel was "in some way associated in the practice of law" with Judge Curtis' spouse and that Judge Curtis was under an ethical obligation to disclose this relationship. Defendant filed an answer to the motion in which he challenged the grounds for disqualification and requested that the court either dismiss the motion as unsupported or hold an evidentiary hearing. Defendant asserted that he had "substantial constitutional interests at

stake," and that "the prosecutor must come forth with more than he has thus far to justify a mistrial."

At the motion hearing on June 23, defense counsel challenged the prosecutor to support the allegation that he had a business relationship with Judge Curtis' spouse. He also called the court's attention to the fact that jeopardy had already attached. The prosecutor stated that he was not sure what the business relationship was except that they appeared to share offices and someone at Mr. Curtis' phone number took a call for defense counsel. The prosecutor argued that Judge Curtis had had a duty to disclose the relationship whatever it was. The prosecutor stated that he was not asking for a mistrial but was asking that the judge disqualify herself, and "the procedural effects will have to be taken up by ... whoever gets it" upon reassignment.

Judge Curtis then explained why she had not disclosed the alleged relationship:

> Mr. Pookrum [defense counsel] is not a member of the law firm Curtis and Edison, either as a partner or an associate. He is not on Curtis and Edison letterhead but maintains his own separate phone line or lines and maintains a straight answering service. He does not share a secretary with Curtis and Edison although phone calls or a phone call may have been answered. He does not file business or for that matter personal income tax returns with any of the members of Curtis and Edison, P.C. Those are the reasons I felt, there was nothing to disclose.

The Judge continued:

> To insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured, I shall recuse myself. This matter will be reassigned. This matter will be transferred to Judge Roberson as the Chief Judge of this court to assign it as he deems appropriate.

When asked whether she was granting a mistrial, the judge responded:

> No, I am simply referring it to Chief Judge Roberson for assignment. He will do whatever, hear any motions, or send it to the appropriate judge for hearing of motions. I am simply granting the motion filed by the People.

The attorneys appeared before Chief

Judge Roberson the same day and explained that Judge Curtis had not declared a mistrial but had only disqualified herself and had left further rulings to another judge. Chief Judge Roberson expressed his view that there were potential double jeopardy problems and mentioned the possibility of sending the case back to Judge Curtis for completion of the trial. The prosecutor stated that he would be taking the position that a mistrial need not be declared and that the trial could proceed before another judge who could read the transcripts of the first day of trial. Chief Judge Roberson made no rulings but adjourned the matter for further briefing and argument.

Defendant then filed a motion for declaration of mistrial and to dismiss on double jeopardy grounds. The hearing resumed on July 28, 1992. At this hearing, the prosecutor stated that after reviewing

the matter, he agreed that a mistrial should be granted. Chief Judge Roberson repeated that jeopardy had attached. The prosecutor responded that Judge Curtis should have disclosed the relationship before trial, and that her midtrial disqualification created manifest necessity for the mistrial. Defendant argued that no relationship between Judge Curtis' spouse and defense counsel sufficient to support a disqualification and manifest necessity for a mistrial was established. Chief Judge Roberson granted the motion for mistrial and postponed his decision on defendant's motion to dismiss in order to review the transcript of Judge Curtis' decision. On September 23, 1992, Chief Judge Roberson issued a written opinion granting defendant's motion to dismiss on double jeopardy grounds, explaining that there had been no showing of manifest manifest necessity for the mistrial.

On appeal, the prosecutor does not challenge the grant of a mistrial but argues that Chief Judge Roberson erred in finding that the bar against double jeopardy required that the charges be dismissed. The prosecutor argues that there was manifest necessity for the mistrial because the appearance of impropriety required Judge Curtis to disqualify herself. The prosecutor relies on Professional and Judicial Ethics Opinions CI-605 and C-216:

> A judge is not automatically disqualified from hearing a case which is conducted by an unrelated attorney when the judge's spouse is the member of the same law office as the attorney acting in the proceeding. In such a case, the judge must disclose the relationship to all the parties to the proceeding and disqualify himself or herself unless all parties formally request the Judge to continue. [CI-605(2), (2-20-81).]
>
> A Circuit Judge is not automatically disqualified from hearing a case conducted by an unrelated attorney simply because a relative of the Judge within the third degree is a member of or an attorney employee of the same law firm as the attorney conducting the

> case. A judge so related should disclose that relationship to all parties and raise the issue of disqualification. The Judge should disqualify himself or herself unless all parties formally request the Judge to continue with the case, in which case the Judge may do so, provided that the relative does not work directly on the case. [Formal Opinion C-216(2), (June 1979).]

These opinions do not apply to the facts of this case. In response to the prosecutor's motion, Judge Curtis made clear that there was in fact no business relationship between defense counsel and Judge Curtis' spouse. Defense counsel was not "a member of or an attorney employee of the same law firm." For this reason, there were no grounds for disclosure, nor for disqualification.

Both the United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy. People v Dawson, 431 Mich 234, 250; 427 NW2d 889 (1988). Jeopardy attaches in a bench trial once the first witness is sworn. People v

Hicks, ___ Mich ___; ___ NW2d ___ (1993) (slip op p 2, rel'd 8-16-93). If a mistrial is declared after jeopardy has attached, the state may not bring the defendant to trial a second time unless the Defendant has consented to the mistrial or the mistrial was the result of manifest necessity. Dawson, supra at 252; Hicks, supra (slip op p 2.) Although manifest necessity is not a precisely defined concept, and a trial court is afforded considerable deference in determining its application, the mere appearance of impropriety does not constitute manifest necessity. Hicks, supra; People v Little, 180 Mich App 19; 466 566 (1989).

In both Hicks and Little, panels of this Court held that a trial court's recusal in order to avoid the appearance of impropriety effected a mistrial without manifest necessity. The Hicks Court quoted from Little:

> While we recognize the desirability of avoiding the appearance of judicial partiality whenever possible, this potential for the deprivation of defendant's 'valued right to have his trial completed by a particular tribunal.' This valued right is more compelling where the defendant, as here, actively opposed the declaration of a mistrial. [Hicks (slip op p 2), quoting Little at 27, quoting United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971).]

Thus, the Hicks and Little panels held that the defendant's in those cases were entitled to dismissal of the charges against them on double jeopardy grounds. Hicks is binding authority under Administrative Order 1990-6, 436 Mich lxxxiv. [1]

Defendant's motion to declare a mistrial, filed after Judge Curtis recused herself and transferred the case to Chief Judge Roberson, was not a waiver of defendant's right to avoid double jeopardy.

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[1] Continued in effect AO 1991-11, 439 Mich xlv, and AO 1992-8, ___ Mich ___.

Defendant's motion to declare a mistrial, filed after Judge Curtis recused herself and transferred the case to Chief Judge Roberson, was not a waiver of defendant's right to avoid double jeopardy. Defendant vigorously objected to Judge Curtis's disqualification and challenged the grounds for the prosecutor's motion. Defendant warned that he had "substantial constitutional interests at stake" and argued that the prosecutors's showing was insufficient to justify a mistrial. When defendant filed his motion for mistrial after Judge Curtis disqualified herself, did so together with a motion to dismiss, making it clear that he would be asserting that the consequence of the mistrial would be dismissal on double jeopardy grounds.

Our decision does not address the question whether Chief Judge Roberson could properly have sent the case back to Judge Curtis for continued trial or whether this

Supreme Court, U.S.
FILED
MAY 30 1995
OFFICE OF THE CLERK

NO. 94-1612

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF MICHIGAN,

PETITIONER,

vs.

RODNEY BELLEW,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

WALTER POOKRUM
Counsel of Record
645 Griswold, Suite 384
Detroit, MI 48226
313/ 222-0323

QUESTION PRESENTED

IN RULING THAT A THIRD TRIAL WAS BARRED BY DOUBLE JEOPARDY BECAUSE A MANIFEST NECESSITY DID NOT EXIST FOR ABORTING THE SECOND BENCH TRIAL, DID THE MICHIGAN SUPREME COURT ACCORD A SCOPE TO THE MANIFEST NECESSITY EXCEPTION TO THE DOUBLE JEOPARDY BAR WHICH LED TO A RESULT WHICH MERITS THE GRANT OF A WRIT OF CERTIORARI WHERE: PETITIONER'S MOTION FOR THE TRIAL JUDGE TO RECUSE HERSELF PRECIPITATED THE MISTRIAL; PETITIONER ASSENTED TO THE DECLARATION OF MISTRIAL; THE STATE COURTS FOUND THAT RESPONDENT HAD NOT CONSENTED TO THE MISTRIAL; AND NEITHER THE INITIAL JUDGE NOR THE SUCCESSOR JUDGE, TO WHOM THE CASE WAS REFERRED AFTER THE RECUSAL, CONSIDERED WHETHER THERE EXISTED REASONABLE ALTERNATIVES TO THE MISTRIAL?

LIST OF PARTIES

RODNEY D. BELLEW
Defendant/Appellee

TYRONE HICKS
Defendant/Appellee

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff/Appellant

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CONSTITUTIONAL PROVISIONS

Mich. Const. 1963, art.1, sec. 15 (in pertinent part):

> No person shall be subject for the same offense to be twice put in jeopardy

United States Constitution, amend. 14 (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States

STATEMENT OF THE CASE

There are several misstatements of fact which appear in the petition for certiorari.

1. In the "Statement of the Questions Presented," petitioner states:

> Did the Michigan Supreme Court misconstrue precedent from this Court in holding that a finding of manifest necessity is required <u>despite</u> defense consent to a mistrial where the defense motivation for consenting to the mistrial is action by the trial court. . . .

Petitioner has presented the question in a manner which is contrary to the findings of the Detroit Recorder's (trial) Court, the Michigan Court of Appeals, and the Michigan Supreme Court. All three courts found that respondent had <u>not</u> consented to the mistrial.

The language of the opinion of the Michigan Supreme Court makes the point best:

> We cannot conclude that the defendant [in either case] consented to the mistrial. Both defendants adamantly opposed [the trial judge's] decision to recuse herself and expressed [their] desire to continue with the chosen factfinder. Accordingly, consent cannot be derived from defendant['s] actions surrounding [the judge's] recusal . . . .
>
> . . . .
>
> Moreover, in Bellew, we believe it would be patently unfair to construe defendant's motion for declaration of mistrial and for dismissal as consent to the mistrial, in light of defendant's vigorous objection to [the trial judge's] recusal. Defendant's motion evidenced his belief that the functional equivalent of a mistrial had occurred upon [the trial judge's] recusal. Although we reject this view today, we decline to transform defendant's attempted clarification of the recusal into consent for a mistrial occasioned by an event outside of defendant's control.
>
> Opinion of the Michigan Supreme Court, appended to Petition, at 28a and 32-34a (emphasis added) and 30a, n.21.

Although petitioner indicates later in the question presented that respondent did not consent to the initial recusal, the language of the question as presented by petitioner could lead a reader to the mistaken conclusion that respondent had somehow requested the mistrial when, in fact, respondent had merely requested that what he believed was a mistrial be called a mistrial and treated as a mistrial. Id., at 28a, n.19.

2. Regarding the "Constitutional Provisions Involved," Petition, at 8: Technically, the fourteenth amendment of the United States Constitution, through which the fifth amendment is applied to the states, and the double jeopardy provision of the

Michigan Constitution, derived from the federal constitution, also apply in these circumstances.

3. Regarding the "Statement of the Case," petitioner states that "the prosecutor dismissed three of the four Receiving and Concealing Stolen Property counts, and the Chop Shop count. . . ." Petition, at 9.

In fact, the prosecutor dismissed the three Receiving and Concealing counts, but failed even to mention the Chop Shop count (Count 9). Brief for Respondent, at 1A and 2A.

4. Petitioner states that "[t]he trial court ultimately granted the defendant's motion for a new trial. . . ." Petition, at 9. In fact, the court granted the motion as to Count 1, but denied it as to Counts 5 - 8. Brief for Respondent, at 3A.

5. Petitioner states that "the prosecutor learned of a business arrangement between defense counsel. . . and the judge's husband. . . The extent of the arrangement was unknown, [but] it became evident that the two shared a common office, common fax number, and a receptionist." Petition, at 10.

The most petitioner can logically assert is it was "evident" that at some point in time, the two attorneys had the same office address and fax number; and someone who answered at the judge's husband's telephone number said she would take a message for

defense counsel. None of this necessarily constitutes a "business arrangement," especially in these days of professional office suites, which underscored the need for the evidentiary hearing requested by defense counsel.

6. Petitioner quotes the trial prosecutor as having said that defense counsel, in turn, told the successor judge that he "had to grant a mistrial and assign [the case] for trial."

Respondent does not have a transcript of the proceedings before the successor judge and therefore cannot prove what was said there. He denies, however, that defense counsel requested that the case be assigned for trial, and submits that it is clear from other portions of the case that counsel requested that the matter be reassigned for sentencing on the counts of which defendant was convicted. Id., at 28a, n.19.

7. Petitioner writes that the Michigan Court of Appeals found that "jeopardy has attached, thus barring retrial." Id., at 15.

The Michigan Court of Appeals held that, because jeopardy had attached and the mistrial was declared without manifest necessity, double jeopardy barred retrial. Brief for Respondent, at 4A and 5A.

8. Petitioner writes that "the majority opinion did not

recognize that the defendant consented to the mistrial." Petition, at 16.

Respondent has made the point previously that three Michigan courts have found that respondent did not consent to the mistrial. See Petition, at 30a, n.21.

SUMMARY OF ARGUMENT

The Michigan Supreme Court opinion regarding this double jeopardy issue differs from well-settled precedent of the United States Supreme Court only in the respects that:

1) The Michigan court extended to a successor judge, following what the state court found was, in effect, the "disability" of the initial trial judge, the requirement of determining manifest necessity before a mistrial is declared.

Previous U. S. Supreme Court cases have thus far applied the manifest necessity determination to initial trial judges, but apparently only because the Court has never ruled in a case in which the initial trial judge became "disabled."

2) The Michigan court tacitly approved of the practice of assigning the case to a successor judge, even though the initial judge did not make a record sufficient to support her recusal, and even though the U. S. Supreme Court has ruled that a defendant has the "valued right" to have his trial completed by a particular tribunal.

Because the result in the state courts was fair under the law and the circumstances, however, and because the manifest necessity determination is especially fact-based, review by this Court is not warranted.

ARGUMENT

Petitioner argues that the Michigan Supreme Court has misconstrued double jeopardy decisions of this Court in resolving the case at issue. This is simply not so.

In reviewing the settled precedent of the United States Supreme Court, the Michigan Supreme Court observed and followed the rule that double jeopardy does not bar retrial where the defendant has consented to the mistrial, United States v. Dinitz, 424 U.S. 600, 607; 96 S.Ct. 1075; 47 L.Ed. 2d (1976), or where there is a manifest necessity for the mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580; 6 L.Ed. 165 (1824).

Petitioner repeatedly insists that respondent consented to the mistrial. All three Michigan courts which addressed the issue, however, including the Michigan Supreme Court, found that respondent did not consent. That left for consideration the question whether there was a manifest necessity for the mistrial which occurred in the trial court.

The United States Supreme Court has also consistently ruled

that there are no mechanical rules or bright-line tests for defining manifest necessity, "explicitly [declining] the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial." United States v. Jorn, 400 U.S. 470, 480; 91 S.Ct. 547, 555 (1971).

In the terminology of the Michigan Supreme Court, the issue in the instant case involves the "scope of the manifest necessity exception to the double jeopardy bar and its application to the particular facts presented." Petition, at 12a (emphasis added). In essence, the Michigan Supreme Court ruled that in order for a judge to find that the necessity of declaring a mistrial is manifest, which finding would ordinarily allow the state to re-try the defendant, the judge must exhaust all options and alternatives to the mistrial. See United States v. Sartori, 730 F.2d 973 (Fourth Circuit, 1984).

This is an established precept. The novel aspect of this case, however, is that this deliberative-procedure requirement was applied to a judge who inherited the case after the judge who initially had it recused herself in response to petitioner's improvident motion. This is what the Michigan Supreme Court referred to by the "scope" of the manifest necessity exception.

If this ruling runs contrary to United States Supreme Court precedent, it does so in this aspect only. See Arizona v.

Washington, 424 U.S. 497; 54 L.Ed. 2d 717; 98 S.Ct. 824 (1978).

Respondent takes issue with this aspect of the ruling, having continually expressed his position that the functional equivalent of a mistrial occurred when the initial trial judge granted petitioner's motion, and that the mistrial was granted in the absence of manifest necessity.

The Michigan Supreme Court rejected this view, see Petition, at 34a; but it affirmed the dismissal on double jeopardy grounds because the successor judge did not determine that there was manifest necessity for the dismissal to which the prosecutor assented. Otherwise, the respondent here would be the petitioner in this Court, because respondent submits that Chief Judge Cavanaugh's opinion presents the correct state of the law on this issue.

Therefore, although respondent concedes that that majority opinion is incorrect in its determination of the scope of the manifest necessity rule, it is correct in its analysis of the procedure by which manifest necessity is to be determined and, on the facts of this case, correct in its result.

If there is one thing which is clear from United States Supreme Court precedent, it is that the manifest necessity determination is inextricably tied to the particular facts of the case. Illinois v. Somerville, 410 U.S. 458; 35 L.Ed. 2d 425; 93

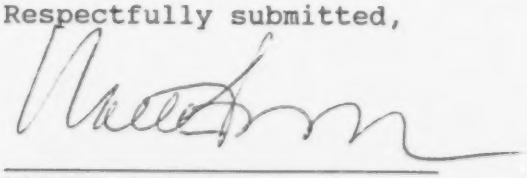
S.Ct. 1066 (1973); Wade v. Hunter, 336 U.S. 684; 69 S.Ct. 834.

Respondent submits that, under the circumstances, there should be a clear abuse of discretion here, or a clearly untenable result, before the grant of a writ of certiorari in this matter would be appropriate.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be DENIED.

Respectfully submitted,



WALTER POOKRUM
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313/ 222-0323

May 30, 1995

Tuesday, September 24, 1991

Detroit, Michigan

* * *

THE COURT: People of the State of Michigan versus Rodney Dwight Bellew. 91-5030.

MR. BIANCO: John Bianco for the People.

MR. SLAMEKA: Robert Slameka for Mr. Bellew.

MR. BIANCO: Your Honor, several of the--we can't sustain our burden over several of the felony counts because of the fact that witnesses have failed to appear. However, there are several misdemeanor counts and one felony count that I can put a case on. It will be very quick, I think that's what we will do, if it's all right with the Court.

THE COURT: All right. Now which count specifically do you not have complainants?

MR. BIANCO: We do not have the complainant on--judge, we are going to try Count I. Dismiss Count II, dismiss Count III. We are going to dismiss Count IV. We are going to dismiss--we are going to try Count V.

THE COURT: And one.

MR. BIANCO: One we are going to try.

THE COURT: Okay.

MR. BIANCO: Two, three, four, we are going to

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dismiss. And we are going to try five, six, seven, and eight.

THE COURT: Any objection to the dismissals on Counts II, III, IV?

MR. SLAMEKA: No, your Honor.

THE COURT: They are dismissed. You care to make an opening statement?

MR. BIANCO: No, Your Honor, we would waive opening statement.

THE COURT: Any objection?

MR. SLAMEKA: We have no objection also waive ours. I would ask that witnesses be sequestered.

THE COURT: The sequestration will apply to prosecution and defense witnesses. Witness will step outside except the first one called. They may not discuss the nature or substance of their testimony with any other witness.

GERALD ROSSO

Having been first duly sworn to tell the truth testified as follows:

DIRECT EXAMINATION.

BY MR. BIANCO

Q. State your name?

A. Detective Gerald Rosso.

Q. What is your occupation?

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essential duty under the Strickland test? I believe he did. It is not enough to say I don't believe the witnesses would have helped. I think he had a duty to at least investigate to determine whether or not any of the witnesses brought by the defendant would have been helped. I think he failed an essential duty in not arguing either by motion in limine or motion to suppress, that certain evidence, particularly the film in the camera be suppressed.

I find that there is or was a reasonable probability that the outcome with respect to Count I would have been different had counsel performed in a reasonably competent manner with respect to those items. I also should note, just an aside, there was no objection except for one or two places in the transcript regarding the officer's conclusion that certain things were stolen including the super 8 engine that as well contributed to the Court's determination with respect to those just cited on this record. Motion is granted in part. Denied with respect to Counts V, VI, VII, and VIII.

MR. POOKRUN: Thank you, your Honor.

MS. LEWIS: Is the Court going to proceed to sentencing on the misdemeanor count?

THE COURT: I was just about to inquire about

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RODNEY DWIGHT BELLOW,

Defendant-Appellee.

January 7, 1994

No. 157434
LC No.91-05030

Before: Jansen, P.J., and White and K. N. Hansen,* JJ.

PER CURIAM.

The prosecutor appeals as of right the trial court's dismissal, on double jeopardy grounds, of one count of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803. We affirm.

Defendant was initially charged with four felony counts of receiving and concealing stolen property in excess of $100 and four misdemeanor counts of concealing or misrepresenting the identity of a motor vehicle without intent to mislead, MCL 750.415; 28.647. At trial, the prosecutor proceeded on only one felony count and all four misdemeanor counts. After a bench trial before Recorder's Court Judge Daphne Means Curtis, defendant was found guilty of all charges tried. Defendant moved for a new trial based on ineffective assistance of counsel. He was granted a new trial on the one felony count. A retrial before Judge Curtis began on June 9, 1992 and was continued to June 23.

On June 18, the prosecutor filed a motion to disqualify Judge Curtis, alleging that defense counsel was "in some way associated in the practice of law" with Judge Curtis' spouse and that Judge Curtis was under an ethical obligation to disclose this relationship. Defendant filed an answer to the motion in which he challenged the grounds for disqualification and requested that the court either dismiss the motion as unsupported or hold an evidentiary hearing. Defendant asserted that he had "substantial constitutional interests at stake," and that "the prosecutor must come forth with more than he has thus far to justify a mistrial."

At the motion hearing on June 23, defense counsel challenged the prosecutor to support the allegation that he had a business relationship with Judge Curtis' spouse. He also called the court's attention to the fact that jeopardy had already attached. The prosecutor stated that he was not sure what the business relationship was except that they appeared to share offices and someone at Mr. Curtis' phone number took a call for defense counsel. The prosecutor argued that Judge Curtis had had a duty to disclose the relationship whatever it was. The prosecutor stated that he was not asking for a mistrial but was asking that the judge disqualify herself, and "the procedural effects will have to be taken up by ... whoever gets it" upon reassignment.

Judge Curtis then explained why she had not disclosed the alleged relationship:

> Mr. Pookrum [defense counsel] is not a member of the law firm Curtis and Edison, either as a partner or an associate. He is not on Curtis and Edison letterhead but maintains his own separate, he maintains his own separate phone line or lines and maintains a straight answering service. He does not share a secretary with Curtis and Edison although phone

*Circuit judge, sitting on the Court of Appeals by Assignment.

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calls or a phone call may have been answered. He does not file business or for that matter personal income tax returns with any of the members of Curtis and Edison, P.C. Those are the reasons I felt, there was nothing to disclose.

The judge continued:

> To insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured, I shall recuse myself. This matter will be reassigned. This matter will be transferred to Judge Roberson as the Chief Judge of this court to assign it as he deems appropriate.

When asked whether she was granting a mistrial, the judge responded:

> No, I am simply referring it to Chief Judge Roberson for assignment. He will do whatever, hear any motions, or send it to the appropriate judge for hearing of motions. I am simply granting the motion filed by the People.

The attorneys appeared before Chief Judge Roberson the same day and explained that Judge Curtis had not declared a mistrial but had only disqualified herself and had left further rulings to another judge. Chief Judge Roberson expressed his view that there were potential double jeopardy problems and mentioned the possibility of sending the case back to Judge Curtis for completion of the trial. The prosecutor stated that he would be taking the position that a mistrial need not be declared and that the trial could proceed before another judge who could read the transcripts of the first day of trial. Chief Judge Roberson made no rulings but adjourned the matter for further briefing and argument.

Defendant then filed a motion for declaration of mistrial and to dismiss on double jeopardy grounds. The hearing resumed on July 28, 1992. At this hearing, the prosecutor stated that after reviewing the matter, he agreed that a mistrial should be granted. Chief Judge Roberson repeated that jeopardy had attached. The prosecutor responded that Judge Curtis should have disclosed the relationship before trial, and that her midtrial disqualification created manifest necessity for the mistrial. Defendant argued that no relationship between Judge Curtis' spouse and defense counsel sufficient to support a disqualification and manifest necessity for a mistrial was established. Chief Judge Roberson granted the motion for mistrial and postponed his decision on defendant's motion to dismiss in order to review the transcript of Judge Curtis' decision. On September 23, 1992, Chief Judge Roberson issued a written opinion granting defendant's motion to dismiss on double jeopardy grounds, explaining that there had been no showing of manifest necessity for the mistrial.

On appeal, the prosecutor does not challenge the grant of a mistrial but argues that Chief Judge Roberson erred in finding that the bar against double jeopardy required that the charges be dismissed. The prosecutor argues that there was manifest necessity for the mistrial because the appearance of impropriety required Judge Curtis to disqualify herself. The prosecutor relies on Professional and Judicial Ethics Opinions CI-605 and C-216:

> A judge is not automatically disqualified from hearing a case which is conducted by an unrelated attorney when the judge's spouse is the member of the same law office as the attorney acting in the proceeding. In such a case, the judge must disclose the relationship to all the parties to the proceeding and disqualify himself unless the parties formally request the judge to continue. [CI-605(2), (2-20-81).]

> A Circuit Judge is not automatically disqualified from hearing a case conducted by an unrelated attorney simply because a relative of the Judge within the third degree is a member of or an attorney employee of the same law firm as the attorney conducting the case. A Judge so related should disclose that relationship to all parties and raise the issue of disqualification. The Judge should disqualify himself or herself unless all parties formally request the Judge to continue with the case, in which case the Judge may do so, provided that the relative does not work directly on the case. [Formal Opinion C-216(2), (June 1979).]

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These opinions do not apply to the facts of this case. In response to the prosecutor's motion, Judge Curtis made clear that there was in fact no business relationship between defense counsel and Judge Curtis' spouse. Defense counsel was not "a member of or an attorney employee of the same law firm." For this reason, there were no grounds for disclosure, nor for disqualification.

Both the United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy. People v Dawson, 431 Mich 234, 250; 427 NW2d 889 (1988). Jeopardy attaches in a bench trial once the first witness is sworn. People v Hicks, ___ Mich ___; ___ NW2d ___ (1993) (slip op p 1, rel'd 8-16-93). If a mistrial is declared after jeopardy has attached, the state may not bring the defendant to trial a second time unless the defendant has consented to the mistrial or the mistrial was the result of manifest necessity. Dawson, supra at 252; Hicks, supra (slip op p 2.) Although manifest necessity is not a precisely defined concept, and a trial court is afforded considerable deference in determining its application, the mere appearance of impropriety does not constitute manifest necessity. Hicks, supra; People v Little, 180 Mich App 19; 466 NW2d 566 (1989).

In both Hicks and Little, panels of this Court held that a trial court's recusal in order to avoid the appearance of impropriety effected a mistrial without manifest necessity. The Hicks Court quoted from Little:

> While we recognize the desirability of avoiding the appearance of judicial partiality whenever possible, this potential for the appearance of judicial partiality must be balanced against the deprivation of defendant's 'valued right to have his trial completed by a particular tribunal.' This valued right is more compelling where the defendant, as here, actively opposed the declaration of a mistrial. [Hicks (slip op p 2), quoting Little at 27, quoting United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971).]

Thus, the Hicks and Little panels held that the defendants in those cases were entitled to dismissal of the charges against them on double jeopardy grounds. Hicks is binding authority under Administrative Order 1990-6, 436 Mich lxxxiv[1].

Defendant's motion to declare a mistrial, filed after Judge Curtis recused herself and transferred the case to Chief Judge Roberson, was not a waiver of defendant's right to avoid double jeopardy. Defendant vigorously objected to Judge Curtis' disqualification and challenged the grounds for the prosecutor's motion. Defendant warned that he had "substantial constitutional interests at stake" and argued that the prosecutor's showing was insufficient to justify a mistrial. When defendant filed his motion for mistrial after Judge Curtis disqualified herself, he did so together with a motion to dismiss, making it clear that he would be asserting that the consequence of the mistrial would be dismissal on double jeopardy grounds.

Our decision does not address the question whether Chief Judge Roberson could properly have sent the case back to Judge Curtis for continued trial or whether this Court could grant such relief in an appropriate case. In this regard, we observe that the prosecutor did not pursue this option in the trial court and has not requested such relief on appeal. Rather, the prosecutor has continued to insist that Judge Curtis was obliged to disqualify herself midtrial after failing to disclose the asserted relationship before trial, and that her disqualification constitutes manifest necessity for a mistrial. The prosecutor appeals only the dismissal on double jeopardy grounds and not the grant of mistrial. We hold that because the mistrial was declared without manifest necessity, the charge was properly dismissed on double jeopardy grounds.

Affirmed.

/s/ Kathleen Jansen
/s/ Helene N. White
/s/ Kurt N. Hansen

[1] Continued in effect AO 1991-11, 439 Mich xlv, and AO 1992-8, ___ Mich ___.

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